82-1271

No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HERMAN DELGADO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether INS agents violate the Fourth Amendment when, possessing probable cause to believe that a number of employees at a factory are illegal aliens, they conduct a survey of the factory's employees by stationing agents at the factory exits and walking through the factory addressing brief inquiries to individual employees suspected of being aliens regarding their citizenship or resident alien status.

PARTIES TO THE PROCEEDING

Joseph Sureck, William French Smith, Leonel J. Castillo (now replaced as Commissioner of INS by Alan C. Nelson), Gil Clarin, and James Robinson were appellees below in their official capacities and are also petitioners here. Herman Delgado, Ramona Correa, Francis Labonte, and Maria Miramontes were appellants below and are respondents here. The International Ladies' Garment Workers' Union, AFL-CIO (ILGWU) was originally a plaintiff in the district court, but the court ordered it dismissed as a party (App. G, *infra*, 59a-61a). ILGWU appealed from the dismissal order, and thus, while the court of appeals did not rule on that portion of the appeal (App. A, *infra*, 43a n.24), ILGWU is nominally a respondent here.

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The Solicitor General, on behalf of the Immigration and Naturalization Service and other petitioners, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-43a) is reported at 681 F.2d 624. The opinions of the district court (Apps. C-G, *infra*, 45a-60a) are not reported.

JURISDICTION

The judgment of the court of appeals (App. H, *infra*, 61a) was entered on July 15, 1982. A petition for rehearing was denied on September 30, 1982 (App. B, *infra*, 44a). On December 20, 1982, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including January 28, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

8 U.S.C. 1357(a) provides in pertinent part:

> Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States; * * *

STATEMENT

Respondents filed two different actions, which were subsequently consolidated, in the United States District Court for the Central District of California seeking declaratory and injunctive relief against the Immigration and Naturalization Service's (INS) practice of conducting factory surveys for the purpose of locating illegal aliens. Respondents' primary contention was that these surveys violated the Fourth Amendment. The district court entered summary judgment on behalf of the INS (App. C, *infra*, 48a). The court of appeals reversed and remanded (App. A, *infra*, 1a-43a).

1. The specific factual context underlying this case consists of three factory surveys conducted by the INS in two garment factories in 1977. The record contains affidavits by government officials relating to the manner of conducting these and other factory surveys, together with depositions of the individual respondents describing the surveys. As the court of appeals found (App. A, *infra*, 8a), the material facts are not seriously in dispute.

a. In both January and September 1977, the INS obtained search warrants authorizing its officers to search the Southern California Davis Pleating Company (Davis Pleating) for illegal aliens. The warrants did not identify any particular illegal aliens by name. Rather, the warrants were based on reliable information showing that Davis Pleating employed illegal aliens; they au-

thorized the INS to search the factory for such persons (App. A, *infra*, 5a & n.5).[1] Pursuant to these warrants, INS officers arrested 78 illegal aliens from among approximately three hundred employees present at Davis Pleating in January 1977. In September 1977, the INS arrested 39 illegal aliens out of a work force of approximately two hundred employees. App. A, *infra*, 4a; 1/17/80 Affidavit of Philip Smith, Exhibit G to Memorandum in Support of Defendants' Motion for Summary Judgment, filed 1/18/80. In October 1977, the INS conducted a survey of the work force at Mr. Pleat, another garment factory. This survey also was conducted because the INS had received information establishing that Mr. Pleat employed illegal aliens. On this occasion, however, the INS agents entered with the consent of Mr. Pleat's owner, rather than pursuant to a warrant. This survey resulted in the apprehension of 45 illegal aliens out of a work force of approximately ninety employees. *Ibid.*

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[1] The affidavit submitted in support of the January warrant stated that INS investigator Gail Richard Kee had conducted surveillance outside the Davis Pleating factory and had stopped three illegal aliens entering the factory. Each of the three women, who were named in the affidavit, informed Investigator Kee that Davis Pleating employed many illegal aliens of Latin extraction.

The September warrant was issued on information volunteered by Rachel Mata, an employee at Davis Pleating who was displeased with the company's hiring of illegal aliens. Mata reported to the INS that two illegal aliens deported following the January survey had returned to the United States and resumed their positions at Davis Pleating. She further stated that many other employees boasted that they had no immigration documents. She also reported that Davis Pleating had recently hired about one hundred employees and that most of them appeared to be illegal aliens. Information was also supplied to the INS by an illegal alien who worked at Davis Pleating. She maintained that four of her coworkers were also illegal aliens.

The factory surveys at both Davis Pleating and Mr. Pleat were conducted in accordance with standard INS procedures established on a nationwide basis. See generally 11/15/79 Declaration of Philip Smith; Affidavit of Philip Smith, Exhibit B to Memorandum in Support of Defendant's Motion to Dismiss, filed 6/30/78; Affidavit of Gail Richard Kee, Exhibit C; Affidavit of Joseph Sureck, Exhibit A. A team of plainclothes INS agents entered the factory to question the employees while other agents stationed themselves at the doors to prevent suspected illegal aliens from escaping.[2] The agents, who did not display any weapons, wore INS badges, identified themselves, and announced their purpose. The officers walked slowly through the factory asking between one and three questions of employees whom they had reason to believe were aliens.[3] General-

[2] As the record demonstrates (see Delgado Dep. 84-85; Labonte Dep. 34-36), the agents at the exits do not prevent employees from exiting the factory. They are stationed at the exits so that they can observe persons who exit or attempt to exit, question as to their citizenship status those persons they believe to be aliens, and arrest those persons whom they have probable cause to believe are aliens illegally in the United States.

[3] The court of appeals stated (App. A, *infra*, 4a) that INS agents are instructed to question each worker as to his citizenship status, but the record demonstrates that this statement is erroneous. As a matter of policy, the INS instructs its agents to question only those persons whom they reasonably suspect of being aliens. See Immigration and Naturalization Service, U.S. Dep't of Justice, Pub. No. M-69, *The Law of Search and Seizure for Immigration Officers* (Rev. June 1979), excerpted at Exhibit H to Memorandum in Support of Defendent's Motion for Summary Judgment, filed 1/18/80. The record, including the depositions of the respondents, confirms that the agents did not question all employees. 11/15/79 Declaration of Philip Smith, at 2; Delgado Dep. 52; Correa Dep. 54-56, 66. In addition, the agents may inquire of employees who are not suspected of being aliens as to whether they know of other employees who are illegal aliens or who have concealed themselves from the agents.

ly, the first question pertained to place of birth or citizenship status. If the individual replied that he was born in the United States or that he was a citizen, usually no further questions were asked. If the response gave the agent reason to believe that the individual was an alien, the agent would ask the basis for the alien's presence in the United States[4] and would ask to see the alien's immigration papers. See, *e.g.*, Delgado Dep. 45-55, 80-81; Labonte Dep. 25; Correa Dep. 48-55, 69; Miramontes Dep. 26-29. Throughout the surveys, the agents used no force. The employees were free to walk around within the factory and to continue with their work. Generally, upon the arrival of the INS agents, some employees would attempt to flee or hide. The agents did not chase these employees, but rather continued their survey until they reached the hiding place of the illegal aliens. See, *e.g.*, Delgado Dep. 40-46, 61-66, 70, 77.

b. The respondents are four employees who were present during the surveys at their work place. None of the respondents was arrested. Respondent Delgado is employed by Davis Pleating and is a citizen born in Mayaguez, Puerto Rico (Delgado Dep. 4-5). During the January survey, he was not questioned by the INS agents regarding his citizenship or immigration status, although he was asked by one agent if he had a key for the back door (*id.* at 52, 59-60). Delgado walked freely throughout the factory during the survey, which lasted between one and one and a half hours (*id.* at 50, 60-61). During the September survey, Delgado again was al-

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Affidavit of Philip Smith, Exhibit B, *supra*, at 4. INS agents are also instructed not to detain individuals except on a reasonable suspicion that they are illegally present in this country. See M-69, *supra*.

[4] For example, the employee might be present in the United States as a permanent resident alien or here on a temporary basis with a valid work permit.

lowed to walk throughout the factory (*id.* at 77-79). On this occasion an INS agent asked Delgado where he was born. When Delgado responded that he was born in Mayaguez, Puerto Rico, the agent moved on to another worker (*id.* at 79-81). While the survey was being conducted, Delgado left the factory building to load a truck. He was neither stopped nor questioned by the INS agent stationed at that door (*id.* at 84-85).

Respondent Correa also worked at Davis Pleating. She is a United States citizen who was born and has always resided in Southern California (Correa Dep. 5, 8). During the surveys, she was permitted to walk through the factory without interference from the immigration officers (*id.* at 61-66). She was asked no questions during the January survey (*id.* at 56). In September, however, an agent asked Correa, as she was walking through the factory, where she was born. After responding that she was born in California, Correa continued on her way without further questioning (*id.* at 69).

Respondent Labonte also worked at Davis Pleating. She is a resident alien who was born in Mexico (Labonte Dep. 5-8). During the September survey she was seated in front of a machine when an agent tapped her on the shoulder and asked to see her immigration papers. She displayed her papers and was not questioned further (*id.* at 37-40). At one point, Labonte exited the factory, approached some INS officers outside the building, and asked them why they were taking the illegal aliens away (*id.* at 31, 34-36, 49-50).

Respondent Miramontes, a resident alien, worked at Mr. Pleat (Miramontes Dep. 6). When the October survey began, Miramontes was walking to her work station from an office when an INS agent asked her if she was a citizen. When she responded that she was not, he asked to see her papers. Miramontes showed her papers, and the agent continued on his way (*id.* at 18-20).

Miramontes had no other contact with the agents (*id.* at 46).

2. Respondents filed two different actions seeking a declaration that INS factory surveys violate the Fourth Amendment and asking that INS be enjoined permanently from conducting them.[5] In particular, respondents challenged the constitutionality of an INS entry into a factory without the consent of the employees or a warrant specifically naming the individuals to be questioned. The second complaint was filed as a class action on behalf of the respondents and all persons of Latin ancestry employed in the garment industry or any other industry in the Central District of California. Complaint, para. 12. The International Ladies' Garment Workers' Union (ILGWU) was also named as a plaintiff in both complaints. The district court denied respondents' motion to certify the class and also dismissed the ILGWU as a party for lack of standing. See App. A, *infra*, 6a; App. G, *infra*, 58a-60a. Thereafter, the district court granted the INS's motion for partial summary judgment, holding that the owner of a workplace may give a valid consent to entry by the INS and that a warrant authorizing such an entry need not identify each person to be contacted by the INS (Apps. E & F, *infra*, 53a-57a). Subsequently, the court entered supplemental findings of fact and conclusions of law, holding, *inter alia*, that the two warrants issued to search for illegal aliens at Davis Pleating were valid and were based upon probable cause (App. D, *infra*, 49a-52a).

On a second motion for summary judgment, the district court considered the Fourth Amendment implications of the manner in which the factory surveys were conducted. The court denied respondents' request for

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[5] The complaint also asserted that the surveys violate the equal protection component of the Fifth Amendment, but the courts below did not reach this issue. See App. A, *infra*, 7a n.7.

an order enjoining the INS from "'interrogating or otherwise interferring [*sic*] with the rights'" of the respondents without an arrest or search warrant naming the respondents or "'reasonable suspicion based on specific, irrefutable facts that [they] are aliens unlawfully in the United States'" (App. C, *infra*, 46a). The court found that none of the respondents had been arrested or detained and that the INS agents were entitled to pose questions to anyone if they did not detain the person. Alternatively, relying on *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976), the court held that, even if respondents technically "had experienced some form of seizure by placement of INS investigators at the factory exits, the degree of intrusion on [respondents] was so minimal that there was no violation of the Fourth Amendment" (App. C, *infra*, 47a). The court also concluded that, under 8 U.S.C. 1357(a)(1), any person believed to be an alien may be questioned about his right to be in the United States. In sum, the court found that respondents' Fourth Amendment rights had not been violated in the course of the factory surveys, and it granted the INS's motion for summary judgment (App. C, *infra*, 45a-48a).

3. The court of appeals reversed (App. A, *infra*, 1a-43a). The court held that the method of executing the factory surveys by stationing agents at the exits to prevent illegal aliens from escaping violated the Fourth Amendment in that it constituted a seizure of the entire work force.[6] The court concluded that such a seizure was illegal in the absence of a "reasonable, individualized suspicion of illegal alienage of each detained worker prior to the execution of the surveys" (*id.* at 40a).

[6] The court upheld the district court's denial of class certification (App. A, *infra*, 43a n.24). It did not reach the question whether the district court correctly dismissed the ILGWU as a party (*ibid.*), and it did not address the validity of the search warrants (*id.* at 9a).

The court first held, relying heavily on *Illinois Migrant Council* v. *Pilliod*, 531 F. Supp. 1011 (N.D. Ill. 1982), appeal pending, Nos. 82-1870, 82-1871 (7th Cir.), that the stationing of agents at the exits "sufficiently intrudes upon the privacy and security interests of the workers that a seizure of the workforce occurs during the surveys" (App. A, *infra*, 12a). The court acknowledged that the respondents "had varying degrees of freedom to circulate through or exit the factories" (*id.* at 19a), but nonetheless held that the work force was seized for the entire duration of the survey. The court stated that the number of INS agents and their display of INS badges "represented a threatening presence of INS agents to the reasonable worker" (*ibid.*). Moreover, the stationing of agents at the exits "indicated to the entire workforce that departures were not to be contemplated" (*ibid.*). Quoting *United States* v. *Anderson*, 663 F.2d 934, 939 (9th Cir. 1981), the court concluded that "even before individual questioning began, a reasonable worker 'would have believed that he was not free to leave'"; and hence, the entire work force was seized within the meaning of the Fourth Amendment (*id.* at 20a).[7]

The court of appeals then held that the Fourth Amendment permits the INS to engage in detentive questioning only on the basis of an individualized suspicion that a worker is an alien *illegally* in this country (App. A, *infra*, 20a-39a). The court first concluded that the Fourth Amendment generally requires a suspicion

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[7] In this connection, the court rejected respondents' contention that, under *Dunaway* v. *New York*, 442 U.S. 200 (1979), the manner in which the factory surveys were conducted constituted an arrest of the work force requiring probable cause (App. A, *infra*, 11a-12a). To the contrary, the court specifically found that no one was arrested "until the investigators had sufficient probable cause to suspect that those in custody were in this country without proper documentation" (*id.* at 12a).

of illegality to support a detention and held that the same requirement applies here (*id.* at 30a-32a). The court recognized that 8 U.S.C. 1357(a)(1) expressly authorizes INS agents "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States," but it construed that provision not as a grant of authority but as a "statutory limitation upon the conduct of INS agents" with respect to their right to engage in non-detentive questioning of an individual (App. A, *infra*, 24a). Thus, the court held that Section 1357(a)(1) imposes a restriction under which INS agents may pose questions only to persons whom they reasonably suspect of being aliens and, moreover, that any questioning that constitutes a seizure under the Fourth Amendment may be conducted only when an agent reasonably suspects that the individual being questioned is an alien illegally present in this country. A different rule, the court concluded, "would grant the INS impermissible discretion to detain and question at whim" (App. A, *infra*, 32a).

The court of appeals further held that any detentive questioning of an alien had to be based on an *individualized* suspicion of illegal alienage (App. A, *infra*, 32a-39a). The court acknowledged that this Court in *United States* v. *Martinez-Fuerte*, *supra*, had recognized that a seizure within the meaning of the Fourth Amendment could be effected in some circumstances in the absence of an individualized suspicion of illegality, but the court distinguished *Martinez-Fuerte* on the ground that it entailed a lesser intrusion than the factory surveys involved here (*id.* at 32a-35a). Thus, the court held that reasonable suspicion or even probable cause to believe that numerous illegal aliens were working in the factories was insufficient to justify the seizure of any individual alien; in this connection, the court explicitly rejected the Third Circuit's contrary holding in *Babula* v. *INS*, 665 F.2d 293 (1981) (App. A,

infra, 35a-39a). Applying these principles to the instant case, the court held that the surveys violated the Fourth Amendment because the entire work force was seized and the INS agents did not have an individualized suspicion that each employee was an illegal alien (*id.* at 39a-42a).

REASONS FOR GRANTING THE PETITION

The court of appeals' decision, if allowed to stand, will have far-reaching practical and legal consequences. First, it will have a direct and significant adverse effect on the ability of the INS to enforce the immigration laws. Beyond that, the decision below incorrectly resolves important Fourth Amendment questions that have broad significance outside the particular context of this case.

From a practical standpoint, the court of appeals' decision almost completely destroys the utility of an important and effective tool in apprehending aliens who are illegally present in this country. Because of the concentration of illegal aliens at certain places of employment and the INS's limited manpower, a survey of employees at a factory at which the INS has reason to believe numerous illegal aliens are employed is one of the INS's most effective enforcement techniques. See Affidavit of Philip Smith, Exhibit B, *supra*, at 1. In 1977, the year in which the surveys at issue here took place, more than 20,000 illegal aliens were identified and arrested in the course of factory surveys in the Los Angeles area alone. 11/15/79 Declaration of Philip Smith, at 2.

The decision below severely undercuts the effectiveness of such surveys. It quite plainly bars under any circumstances the stationing of agents at exits to prevent illegal aliens from fleeing during a factory survey. Under the reasoning of the court of appeals, even if INS agents have probable cause to believe that 99 out of 100 persons present in a factory are illegal aliens,

agents cannot be stationed at the exits because that would constitute an illegal seizure of the one person inside who is not an illegal alien.[8] Clearly, the effectiveness of factory surveys will be greatly diminished, if not totally destroyed, if the INS is not permitted to station agents at the doors of a factory to prevent escape while the survey is being conducted. Indeed, the court of appeals itself recognized that its decision barring the stationing of agents at the exits would reduce substantially the number of illegal aliens apprehended and hence hinder INS enforcement efforts (App. A, *infra*, 16a, 42a). Moreover, to the extent the INS is able to continue with such surveys at all in light of the court's opinion, the disorder and danger involved in conducting the surveys will be greatly increased because illegal aliens will be encouraged to flee by the absence of anyone guarding the exits.

From a legal standpoint, the potential precedential impact of the decision below on Fourth Amendment law is even greater. In the specific immigration context, the court of appeals' decision calls into question the constitutionality of a federal statute, and it expressly creates a conflict with a decision of another court of appeals with respect to the legality of established INS practices. More broadly, the decision casts doubt on the validity of longstanding police practices directed at apprehending criminals who have been able to mingle temporarily with innocent persons. The significant impact on Fourth Amendment law of the erroneous rulings of the court of appeals creates a compelling need for review by this Court.

1. The court of appeals seriously erred in holding that the stationing of agents at exits during a factory survey

[8] Significantly, two of the three factory surveys underlying the present litigation were supported by a warrant based upon probable cause to believe that a number of the employees at the factory named in the warrant were illegal aliens.

constitutes an illegal seizure of the entire workforce. The court purportedly applied the test set forth by Justice Stewart in *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980) (footnote omitted), that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." See App. A, *infra*, 12a-13a, 19a-20a; see also *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968). However, it simply ignores the realities of the situation to hold that every worker in a factory is "seized" under this test as soon as INS agents commence a factory survey by taking up positions at the exits and before any questioning at all has occurred.

Preliminarily, we note that it is only in a theoretical sense that the work force here, or in any typical factory survey, can be characterized as having a "freedom to leave" that is restrained by the appearance of the INS. The factory surveys in this case were conducted during morning working hours (see Delgado Dep. 66; Correa Dep. 59; Labonte Dep. 17). At that time the employees surely were obligated to be present at their work stations performing their employment duties; quite apart from the appearance of the INS agents, the employees were not "free to leave" the factory in any real sense. Given the undisputed finding (see App. A, *infra*, 19a) that during the survey employees were free to walk through or exit the factory in the course of performing their duties, the court of appeals' opinion does not explain how the INS agents here restrained the "freedom to leave" of members of the work force in any meaningful sense.

More fundamentally, there is no basis for finding that employees who were not illegal aliens would have felt their freedom restrained by the stationing of agents at the exits. The purpose of the survey was manifest and was announced by the INS agents, namely, to appre-

hend illegal aliens. Hence, as respondent Correa candidly testified (Correa Dep. 76), a citizen or alien legally present in this country knew immediately that he or she personally had nothing to fear from the INS; such individuals could not reasonably have felt threatened or restrained by the survey. They reasonably should have understood that the INS agents at the exits were positioned to stop only illegal aliens from leaving, not to curtail the movements of others. Thus, contrary to the court of appeals' suggestion (App. A, *infra*, 11a), a citizen or legal alien should not have felt coerced if he saw workers arrested who were trying to flee.

Furthermore, even accepting the court of appeals' view that the stationing of agents at the exits is in some technical sense a seizure of the entire work force, including those employees who are not illegal aliens, the court of appeals nevertheless erred in finding that such precautionary action violates the Fourth Amendment. This Court has recognized that a limited intrusion that rises to the level of a Fourth Amendment "seizure" may in some circumstances be effected in the absence of an individualized basis for suspicion. *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976). There, the Court sanctioned the operation of a fixed checkpoint on a California highway that required all vehicles to come to a virtual halt as they passed by, even though the Court assumed that each car was thereby "seized" within the meaning of the Fourth Amendment. See *id.* at 546 n.1, 556. Moreover, the Court held that the Constitution permitted the selective referral of some vehicles to a secondary checkpoint for three to five minutes of questioning without an articulable basis for suspecting that the vehicle contained illegal aliens. *Id.* at 563-564. Just as in *Martinez-Fuerte*, the law enforcement interests that make it reasonable to station agents at factory exits during a survey outweigh the minimal intrusion occasioned thereby, and hence any theoretical

seizure of the entire work force does not violate the Fourth Amendment.

The court of appeals' effort to distinguish *Martinez-Fuerte* on the ground that it involves a lesser intrusion than a factory survey (App. A, *infra*, 32a-35a) cannot withstand analysis. To be sure, employees at a factory do not know in advance when their workplace is going to be surveyed, while a traveler familiar with the highway in *Martinez-Fuerte* would not have been surprised to come upon the checkpoint (although he could not have anticipated being selected for secondary referral). In the most significant respects, however, the alleged seizure involved in the factory survey is substantially less intrusive than the checkpoint stop in *Martinez-Fuerte*. First, the alleged seizure in connection with the factory survey is only theoretical; the workers are free to go about their business and, as a practical matter, they engage in the same activity that they would if the INS did not appear. By contrast, the traveler stopped at a checkpoint is truly "stopped" and is diverted completely for three to five minutes from what he would otherwise have been doing.[9] Furthermore, it is difficult to see how the factory survey could engender any anxiety in an individual who is legally in this country; because he is immediately aware that the purpose of the survey is to apprehend illegal aliens, he knows that he

[9] The court of appeals sought to distinguish *Martinez-Fuerte* on the ground that it involved a detention of much shorter duration than that involved here (see App. A, *infra*, 34a). But the court's holding that each individual member of the work force is seized for one and one-half hours during a factory survey is manifestly erroneous. While the entire survey, during which the employees are free to continue to go about their work, may last that long, it is clear that, to the extent there is any detention at all, the maximum that any individual who wishes to leave is detained is the very short time needed for him to answer an agent's question regarding his citizenship status, after which he clearly is free to leave.

is not subject to arrest and at worst will be asked only to answer a question about his citizenship status or show proper documentation to the agents. At a checkpoint, however, an individual singled out for selective referral will be considerably more anxious because he will often not be aware of the reason he has been singled out, and hence the seizure is significantly more intrusive for him.

The error of the court of appeals' analysis is manifested by the broad and unacceptable implications of its holding. According to the decision below, if one or more criminal fugitives were to flee into a building that also contained innocent persons, the police would not be permitted to guard the exits of the building and briefly check everyone who exited because that would constitute an illegal seizure of the innocent occupants. Indeed, under the court of appeals' decision, it is difficult to discern the constitutional basis for a roadblock to catch a fleeing criminal or to check for safety violations, since innocent persons would surely be stopped. But see *Delaware* v. *Prouse*, 440 U.S. 648, 663 (1979); *United States* v. *Martinez-Fuerte*, *supra*, 428 U.S. at 560 n.14. This extraordinary expansion of the Fourth Amendment by the court of appeals merits this Court's review.

2. a. Following up its conclusion that the entire work force is seized when INS agents station themselves at the exits during a factory survey, the court of appeals issued two other important Fourth Amendment rulings that warrant review by this Court. First, the court answered in the negative the question reserved by this Court in *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884 n.9 (1975)—whether an INS agent may stop an individual reasonably believed to be an alien when there is no specific reason to believe that he is illegally in this country. As the court of appeals noted (App. A, *infra*, 23a), the lower courts have struggled with this

issue and have reached somewhat divergent results. Compare *Lee* v. *INS*, 590 F.2d 497 (3d Cir. 1979), with *Au Yi Lau* v. *INS*, 445 F.2d 217 (D.C. Cir.), cert. denied, 404 U.S. 864 (1971). Clarification of this area of the law by this Court would facilitate the consistent adjudication of immigration cases in the lower courts.

Moreover, the court of appeals' ruling casts serious doubt on the validity of a federal statute, 8 U.S.C. 1357(a)(1), which provides that INS agents are empowered without warrant "to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States * * *." By its terms, the statute plainly does not require any suspicion of illegality as a prerequisite to such interrogation. Although the court of appeals was of the view that the Constitution does not permit any seizure of a person on the basis of alienage alone without a suspicion of illegality (see App. A, *infra*, 31a-32a), the court did not expressly find Section 1357(a)(1) unconstitutional. Rather, it interpreted the statute as referring only to questioning that does not involve a seizure under the Fourth Amendment (App. A, *infra*, 24a).[10] Because nothing in the Constitution prevents a law enforcement officer from addressing questions to anyone on the street so long as no seizure occurs (see, *e.g.*, *Terry* v. *Ohio*, *supra*, 392 U.S. at 34 (White, J., concurring)), the court of appeals reached the surprising conclusion that Section

[10] The court did not explain what sort of questioning it had in mind. Because of its holding here that the entire work force was seized before any questioning occurred, the court did not consider whether the questioning reflected in the record in and of itself necessarily involved a seizure. Given its expansive view of the kind of INS conduct that gives rise to a seizure (see App. A, *infra*, 18a), however, it seems clear that the class of questioning that the court would recognize as non-detentive is small indeed (see *id.* at 40a n.23).

1357(a)(1), under its interpretation, was a "statutory limitation" on INS authority (App. A, *infra*, 24a).

As a matter of statutory construction, this reading of Section 1357(a)(1) is, to put it mildly, difficult to justify. The use of the term "interrogate" hardly connotes an intent to limit the reach of the statute to non-detentive questioning. And it is incomprehensible why Congress should have wished to impose such a special limitation on INS authority when it was seeking to improve enforcement of the Nation's immigration laws. Thus, both this Court and the lower courts generally have understood Section 1357(a)(1) to cover questioning that constitutes a "seizure" within the meaning of the Fourth Amendment. See, *e.g.*, *United States* v. *Brignoni-Ponce*, *supra*; *Lee* v. *INS*, *supra*, 590 F.2d at 500; *United States* v. *Martinez*, 507 F.2d 58, 61 (10th Cir. 1974). Therefore, the soundest reading of the decision below is that the court interpreted Section 1357(a)(1) in this fashion in order to save its constitutionality, reasoning that the common sense interpretation of the statute would violate the Fourth Amendment (see App. A, *infra*, 31a-32a). See also *Illinois Migrant Council* v. *Pilliod*, 548 F.2d 715 (7th Cir. 1977) (en banc); *Au Yi Lau* v. *INS*, 445 F.2d 217, 223 (D.C. Cir.), cert. denied, 404 U.S. 864 (1971). This suggestion of the unconstitutionality of a federal statute warrants review by this Court. Cf. 28 U.S.C. 1252.[11]

We submit that the court's conclusion of unconstitutionality is flawed. The primary basis for the holding is the view that the Fourth Amendment absolutely prohibits effecting a seizure in the absence of a reasonable suspicion of illegality (see App. A, *infra*, 22a-31a). But

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[11] In *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), this Court limited on constitutional grounds the authority to *search* granted by Section 1357. That decision in no way affected, however, the INS's authority to interrogate conferred by Section 1357(a)(1).

this analysis ignores this Court's admonition that "the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion." *Martinez-Fuerte*, *supra*, 428 U.S. at 561. In the immigration context, it is "reasonable" under the Fourth Amendment for a stop to be based on alienage, even in the absence of a suspicion of *illegal* alienage. By statute, Congress has conditioned each alien's privilege of residing or working in the United States on fulfillment of the obligation to carry at all times a registration card evidencing his right to be here. 8 U.S.C. 1304(e). Aliens who choose to work or reside here accept that obligation and, by the same token, the obligation to produce proper documentation when requested to do so by INS officials pursuant to 8 U.S.C. 1357(a)(1). See *Brignoni-Ponce*, *supra*, 422 U.S. at 884. If they were free to refuse such a request, the requirement to carry identification would be rendered virtually meaningless. Thus, it is reasonable under the Fourth Amendment for an INS agent briefly to detain an individual reasonably suspected of being an alien so long as the detention is limited to inquiring as to the alien's right to be present in the United States.[12]

b. Finally, the court of appeals held that the required suspicion of illegality must be individualized, *i.e.*, the INS agents' reasonable suspicion (or even probable cause to believe) that numerous factory employees

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[12] As noted above (note 2, *supra*), as a policy matter the INS has instructed its agents not to detain individuals for questioning except on a reasonable suspicion of illegal alienage. This policy reflects a recognition of the INS's manpower limitations and an attempt to formulate a uniform nationwide policy that comports with the Seventh Circuit's decision in *Illinois Migrant Council* v. *Pilliod*, *supra*. Contrary to the court of appeals' assertion (App. A, *infra*, 20a n.12), the policy does not constitute a "concession" that brief questioning of an alien amounting to a seizure within the meaning of the Fourth Amendment is prohibited in the absence of a suspicion of illegality. Cf. *United States* v. *Caceres*, 440 U.S. 741 (1979).

were illegal aliens did not justify the seizure of any particular employee. This holding creates a new Fourth Amendment requirement that will make it quite difficult for the INS to act on reliable information concerning concentrations of illegal aliens. The Fourth Amendment simply does not contain any such requirement of individualized suspicion. Obviously, in order to detain a single individual, a law enforcement officer must have reason to believe that that individual is engaged in illegal activity; but there is no reason why the basis for suspicion must be "individualized." Thus, for example, if an officer knows that seven out of ten persons are illegal aliens, the knowledge that three of the persons will turn out to be innocent does not alter the fact that, in the absence of any additional information dispelling the suspicion with respect to a particular individual, the officer has a reasonable suspicion of illegal alienage with respect to each person sufficient to justify an initial detention for purposes of inquiry.[13]

This principle has been recognized by this Court. The clearest example is in the context of administrative searches, where the Court has expressly stated that a warrant for an "area inspection" need not be based on specific information about any particular building. *Camara* v. *Municipal Court*, 387 U.S. 523, 538 (1967); see also *United States* v. *Biswell*, 406 U.S. 311 (1972). In the immigration context, the right to stop a car at a fixed checkpoint does not rest on any individualized basis for suspicion of a particular car (see *Martinez Fuerte*, *supra*, 428 U.S. at 560-563); by the same token, the Court has not suggested that the INS may conduct a roving patrol stop only where it has reason to suspect

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[13] Of course, the reasonable suspicion standard recognizes that in some cases further inquiry will dispel the suspicion. Thus, as long as it is supported by reasonable suspicion at the time, a detention is consistent with the Fourth Amendment even though the suspicion later turns out to have been unfounded.

that *every* occupant of a car is an illegal alien or engaged in criminal activity (see *United States* v. *Brignoni-Ponce*, *supra*). See also *Almeida-Sanchez* v. *United States*, *supra*, 413 U.S. at 283-285 (Powell, J., concurring).

The court of appeals explicitly recognized (App. A, *infra*, 35a-39a) that its holding on this point placed it in conflict with the Third Circuit's decision in *Babula* v. *INS*, 665 F.2d 293 (1981). In that case, the court upheld a factory survey similar to the ones involved here. The court rejected the contention that the employees of the factory could not be "seized" for questioning concerning their citizenship status in the absence of an individualized basis for suspicion (*id.* at 296-297), holding that the suspicions based "on the milieu in which the workers were found" (*id.* at 296) provided an adequate basis for the detentions. The decision below is also fundamentally inconsistent with *Blackie's House of Beef, Inc.* v. *Castillo*, 659 F.2d 1211 (D.C. Cir. 1981), cert. denied, 455 U.S. 940 (1982). In *Blackie's*, the court upheld the issuance of an administrative search warrant for a restaurant based on probable cause to believe that illegal aliens worked there, although the warrant did not particularly describe or name the illegal aliens sought. While the court was not presented with the precise question of the validity of a seizure without individualized suspicion, its opinion makes clear that it understood the INS to be empowered to question employees who appeared to be aliens on the basis of the same generalized suspicion that supported the warrant. 659 F.2d at 1225-1226. The need to resolve this conflict in the circuits also militates in favor of review by this Court of the decision below.

In sum, both the practical impact of the decision below as a whole and the erroneous resolution by the court of appeals of the discrete Fourth Amendment issues addressed warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1983

APPENDIX A

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO; HERMAN DELGADO; RAMONA CORREA; FRANCIS LABONTE; AND MARIA MIRAMONTES, ON BEHALF OF THEMSELVES AND ALL PERSONS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS,

v.

JOSEPH SURECK; WILLIAM FRENCH SMITH;* LEONEL J. CASTILLO; AND THE IMMIGRATION AND NATURALIZATION SERVICE, DEFENDANTS-APPELLEES.

THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO; HERMAN DELGADO; RAMONA CORREA; FRANCIS LABONTE AND MARIA MIRAMONTES, ON BEHALF OF THEMSELVES AND ALL PERSONS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS,

v.

JOSEPH SURECK; GIL CLARIN; JAMES ROBINSON, WILLIAM FRENCH SMITH;* LEONEL J. CASTILLO; AND THE IMMIGRATION AND NATURALIZATION SERVICE, DEFENDANTS-APPELLEES.

Nos. 80-5054, 80-5153, 80-5035 and 80-5152.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 9, 1981.

Decided July 15, 1982.

On Appeal from the United States District Court for the Central District of California.

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*Pursuant to Rule 43(c)(1) of the Federal Rules of Appellate Procedure, William French Smith has been substituted for Benjamin R. Civiletti as the defendant.

Before ANDERSON and NORRIS, Circuit Judges, and MUECKE, District Judge**.

J. BLAINE ANDERSON, Circuit Judge:

This case presents another challenge to the methods used by the Immigration and Naturalization Service (INS) in its efforts to vigorously enforce the nation's immigration laws. Appellant International Ladies' Garment Workers' Union (ILGWU) and the named appellants appeal from district court rulings dismissing the ILGWU as a representational plaintiff, denying class certification, and denying two motions for summary judgment while granting cross motions for summary judgment in favor of the appellees (all referred to as "INS"). We reverse the summary judgment granted to the INS on the challenge to the detention and questioning.

I. FACTS

Two actions, eventually consolidated, were filed in the district court requesting declaratory and injunctive relief from the INS' pattern and practice of conducting factory surveys or sweeps through factories and workplaces for purposes of locating illegal aliens.[1] Appellants challenge the INS activity as violative of the Fourth and Fifth Amendments.

**The Honorable C. A. Muecke, Chief Judge, United States District Court for the District of Arizona, sitting by designation.

[1] Throughout this opinion, the term "illegal alien" refers to aliens who have entered this country and/or are found to be in this country in violation of the laws of the United States. In this category are aliens who enter without inspection, aliens who overstay their non-immigrant visas and passes, and any others who enter or remain in the United States in violation of immigration and other laws. For most purposes, the term is synonymous with deportable alien. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 553, 96 S.Ct. 3074, 3080, 49 L.Ed.2d 1116 (1976).

The record demonstrates that at the time this litigation was initiated, the INS concentrated its Area Control operations[2] at workplaces rather than in residential areas because of the agency's limited resources and its experience in successfully apprehending large numbers of illegal aliens employed in various factories, most notably in the garment industry. The record also indicates that the Los Angeles District Office of the INS was conducting approximately four factory surveys per week and, on occasion, more than 100 illegal aliens were apprehended in a single factory as a result of surveys performed at various establishments.

The record also describes the typical factory survey as one commenced when the INS receives information, sometimes from anonymous sources, that a particular workplace may be employing illegal aliens. In order to verify this information, INS agents place the suspected workplace under visual surveillance in an effort to determine from observations of the workforce entering and leaving the workplace whether the company does indeed employ illegal aliens. If their information is verified, the agents are instructed to request permission of the workplace owner or management for the INS to enter and question suspected illegal aliens with the ultimate objective of arresting those found to be in the country illegally and referring them to appropriate deportation proceedings. The INS reports that approximately 90% of the owners and managers consent to the surveys of their workforce; the INS obtains search warrants to enter premises without such consent.

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[2] Record references to Area Control define it as operations which are designed to locate and apprehend aliens illegally in the United States. Declaration of Phillip Smith, Assistant Director for Investigations, Los Angeles District Office of the Immigration and Naturalization Service; Exhibit A, C.R. 97. Factory surveys apparently are considered to be a category of Area Control.

The record is free of disputed issues of material fact, although varying characterizations of the events surrounding the typical factory survey appear. After receiving consent or pursuant to warrant, INS agents enter the workplace by stationing agents at exits and entrances in order to prevent persons from leaving the workplace.[3] The remaining agents proceed through the factory, questioning workers as to their citizenship status. While the officers and agents are instructed to be courteous and cause as little disruption as possible, the survey process often begins with workers' cries of "la migra" (the immigration), followed by attempts by some workers to hide or run from INS officers conducting the survey. Disruption of the workplace usually occurs. The officers are instructed to question each worker, although the INS admits that such a task is not often possible.[4]

Three particular surveys are challenged in this case. Search warrants were issued for two surveys conducted at the Southern California Davis Pleating Company (Davis) workplace, the first conducted on January 4, 1977, where 78 illegal aliens were apprehended, and the other conducted on September 27, 1977, where 39 illegal aliens were apprehended. The third challenged survey occurred at a firm known as Mr. Pleat on October 3, 1977, where the INS entered by consent of the owner and where 45 illegal aliens out of workforce of approximately 90 were arrested. Appellants Delgado and Correa, United States citizens, and appellant Labonte, a resident alien, were all subjected to INS questioning at the Davis plant during the September survey. Appellant Miramontes, a resident alien, was asked three questions during the October survey of Mr. Pleat.

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[3] Affidavit of Phillip Smith; C.R. 14 at 3.

[4] *Id.*; at 4.

The search warrants for the Davis surveys were issued under Fed.R.Crim.P. 41 and did not state with particularity the names of any individual illegal aliens sought as the objects of the searches.[5] The INS entered the M[illegible]. Pleat facility with the consent of the owner of the facility and not the consent of all of the workers. The record also indicates that during the Davis surveys, the INS agents did not question every worker as policy would usually dictate because manpower limita-

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[5] The search warrants issued for the January and September 1977 surveys of the Davis facility do not state that particular named persons were the objects of the surveys, but merely state that the INS investigator who executed the affidavit in support of the warrant had reason to believe that on the Davis premises:

> "there is now being concealed certain property, namely persons, namely illegal aliens which are the fruits and instrumentalities and evidence of violations of Title 8, United States Code, Sections 1324 and 1325, . . ."

E.R. at 110 and 413.

Both warrants were issued pursuant to information obtained by INS investigators through their surveillance of the Davis plant. The affidavit in support of the January 1977 survey did not list names of particular persons sought, but consisted of statements made by aliens apprehended while attempting to enter the Davis plant to the effect that they believed other illegal aliens were presently employed by Davis. In addition, the INS investigator affiant stated that he personally "noted that twenty persons of apparent Latin decent [sic] entered [the Davis premises] through the West door." E.R. at 113.

The affidavit in support of the September 1977 survey warrant contained information regarding an alleged complaint by one of the Davis citizen employees who said she could identify two named workers at Davis who had returned to work after having previously been deported as a result of the January survey. The same complainant suspected that many new hirees were illegal aliens "based on their behavior and comments." Finally, the affidavit stated that an illegal alien apprehended while approaching the outside of the Davis plant stated that she personally knew of four additional unnamed illegal aliens employed at the Davis plant.

tions prevented such a procedure in a factory employing 200-300 workers as did Davis at the time of the surveys. Instead, the workers chosen for questioning at the Davis surveys were selected with the agents' use of a combination of objective and subjective factors.[6]

As the labor organization certified as the exclusive representative of production and maintenance employees at the Davis and Mr. Pleat facilities, the ILGWU asserts its representational capacity to sue on behalf of its members under the Labor-Management Relations Act of 1947, 29 U.S.C. §§ 141, *et seq.* The ILGWU alleges that it represents thousands of garment workers, the majority of whom are of Latin ancestry employed in shops throughout the Central Judicial District of California. It alleges injury to itself and its members as a result of the INS factory surveys. Acting upon a motion filed by the INS, the district court ordered the Union dismissed from the litigation by an order filed on November 16, 1979, and entered as a final judgment under Fed.R.Civ.P. 54(b) on December 13, 1979. The Union appeals from this dismissal in Nos. 80-5035 and 80-5054.

The appellants' motion to certify a class consisting of "all persons of Latin ancestry or of a Spanish surname who are, will be, or have been employed in the garment industry or in any other industry in the Central Judicial District of California" was denied by Order entered May 31, 1979. Appellants appeal from this order in Nos. 80-5152 and 80-5153.

In December of 1979, the parties filed cross-motions for partial summary judgment on the issues of the con-

[6] Some agents describe the selective process as one involving the use of factors which may indicate that a person is an alien; e.g., the person's clothing, facial appearance, hair coloring and styling, demeanor (i.e., anxiety or fright), language and accent, and a multitude of subjective factors that one agent described as "multisensory" factors.

stitutional validity of the search warrants and the validity of the surveys conducted with consent of only the owner of the Mr. Pleat workplace. On these issues, the district court found for the INS, holding the warrants valid as issued under Fed.R.Cr.Pro. 41(b)(4), containing sufficient particularity as to the persons to be seized and based upon sufficient probable cause. As an alternative holding, the district court found that the appellants lacked a sufficient privacy interest in their workplace to contest the surveys pursuant either to warrant or consent.

In January of 1980, the parties filed cross-motions for summary judgment on the remaining issues involving the propriety of the INS detention and questioning of workers during the surveys. On these issues, the district court again found for the INS, holding that the appellants were not arrested, detained or seized in a manner implicating the Fourth Amendment, that the INS properly conducted the questioning pursuant to statutory authority contained in 8 U.S.C. § 1357(a)(1), and that even if appellants had experienced some form of seizure by the placement of the INS investigators at factory exits, that the degree of intrusion was so limited that no Fourth Amendment violation existed.

The American Jewish Committee and the Mexican American Legal Defense and Educational Fund were granted leave to file an amicus curiae brief. The amici concentrate on alleged Fifth Amendment equal protection violations stemming from the surveys. The record contains no reference to district court action on the Fifth Amendment issues raised.[7]

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[7] Although the Fifth Amendment claim is mentioned in the First Amended Complaint in CV 78-0740-LEW (PX) (ER at 93), and in the Complaint in CV-78-324-LEW (PX), and is addressed briefly in Plaintiffs' Motion for Summary Judgment filed 1/18/80 ER 655-57) (only three pages), the district court never addressed the Fifth Amendment issue in any of its orders, find-

II. STANDARD OF REVIEW

This case appeared before the district court on two sets of cross-motions for summary judgment. In granting the motions in favor of the INS, the district court also adopted, with some changes, the prepared findings of fact and conclusions of law as submitted to the court by the INS. The most significant of the findings and conclusions were the district court's determinations that the plaintiffs did not have a legitimate privacy interest in the factory premises in order to contest the issuance of the search warrants, that none of the named plaintiffs had been arrested, detained or seized, and that the placing of INS agents at the exits of the factory during the operation did not rise to a level implicating Fourth Amendment constraints upon INS conduct.

Our review of summary judgment findings is *de novo*. This court will affirm a grant of summary judgment only if it appears from the record, after viewing all evidence and factual inferences in the light most favorable to the appellant, that there are no genuine issues of material fact and that the appellee is entitled to prevail as a matter of law. *Gaines v. Haughton*, 645 F.2d 761, 769 (9th Cir. 1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 1006, 71 L.Ed.2d 297 (1982); *Heiniger v. City of Phoenix*, 625 F.2d 842, 843 (9th Cir. 1980). The appellants and appellees agree that none of the material facts are in dispute. The district court acknowledged this as well. Finding of Fact No. 5, filed February 15, 1980, and Finding of Fact IV, filed February 20, 1980. Additionally, we find no evidence in the record that the parties intended a trial on stipulated record which would suggest a clearly erroneous standard

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ings or conclusions, and the defendants/appellees never addressed it in their papers below. In view of our disposition, we need not reach these issues.

of review of the district court's findings. *See Starsky v. Williams*, 512 F.2d 109 (9th Cir. 1975). We will, therefore, consider this case to be governed by the standard of review of district court findings applicable to summary judgments, and will review the record with all reasonable evidentiary inferences granted in favor of the appellants.

III. INS ENTRY WITH SEARCH WARRANT AND CONSENT

The searches at the Davis plant were conducted after the INS had procured search warrants issued by federal magistrates. Appellants assert that the warrants were defective because they were not supported with sufficient probable cause, were lacking in particularity since neither warrant listed the names or identity of particular aliens sought, and that Fed.R.Crim.P. 41 does not authorize the issuance of the type of warrant employed by the INS. We need not reach any of these questions because we are persuaded that the conduct of the INS during the factory surveys violated the Fourth Amendment rights of the factory workers.[8]

IV. FOURTH AMENDMENT CONSIDERATIONS REGARDING DETENTIVE QUESTIONING

1. Execution of the Factory Surveys Constitutes a Seizure Cognizable under the Fourth Amendment.

We now turn to the issues raised by the appellants' challenges to the conduct of the INS upon entry into

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[8] In any event, the INS admitted during oral argument that reliance on the warrants was limited to justification for the initial entry into the workplaces. We therefore consider the detentive questioning of the workers to have been warrantless and do not pass judgment upon the propriety of the INS' use of such search warrants. *Cf. Blackie's House of Beef v. Castillo*, 659 F.2d 1211 (D.C.Cir. 1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 1432, 71 L.Ed.2d 651 (1982).

the factories. A critical threshold issue here concerns the applicability of the Fourth Amendment to the INS questioning of workers during the factory surveys. The Fourth Amendment applies to law enforcement activities involving seizures of the person, including brief detentions short of a traditional arrest. *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981); *United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); *Reid v. Georgia*, 448 U.S. 438, 440, 100 S.Ct. 2752, 2753, 65 L.Ed.2d 890 (1980); *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979); *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 2578, 45 L.Ed.2d 607 (1975); *Terry v. Ohio*, 392 U.S. 1, 16-19, 88 S.Ct. 1868, 1877-78, 20 L.Ed.2d 889 (1968).

The INS contends that the facts of this case do not present a detention or seizure which would implicate the objective standards required by the Fourth Amendment, relying primarily upon statements from *Terry v. Ohio, supra; United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); *Cuevas-Ortega v. INS*, 588 F.2d 1274 (9th Cir. 1979); and *Cordon de Ruano v. INS*, 554 F.2d 944 (9th Cir. 1977). The INS argues that the test for a seizure is one requiring an analysis whether a reasonable, innocent person in the position of plaintiffs would feel free to leave. The INS answers that question, as applied to the facts of the present case, in the negative, contending that the four named plaintiffs circulated throughout the factories and could not reasonably feel detained by the apearance of INS investigators. The INS discounts the stationing of investigators at the exits of the factories by arguing that the plaintiffs complain only of a single encounter with INS investigators, who did not display a weapon or uniform, asking only one to three ques-

tions. These facts, the INS argues, constitute no Fourth Amendment seizure of the plaintiffs.

Appellants argue that the execution of the factory surveys involved a seizure in the nature of custodial detention requiring articulation of probable cause for the arrest of the workers, relying upon *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). In the alternative, the appellants contend that the factory surveys at least rose to the level of a seizure short of a traditional arrest, citing to *Brignoni-Ponce*, *supra*, and *Terry v. Ohio*, *supra*. Appellants maintain that the surveys are conducted with an exercise of physical force and a show of authority restraining the liberty of the workers. They point to the procedure whereby the exits to the factories are sealed off, while workers are immediately made aware of this action. They contend that the entry of the large number of agents into the workplace wearing badges and the common observation of immediate arrests of some workers who are seen attempting to flee increases the coercive impact of the operation. Appellants conclude that the plaintiffs are all made aware that for the duration of the survey, they are effectively detained in the custody of the INS agents performing the factory survey.

Initially, we would have to disagree with the appellants that a custodial detention of the sort observed in *Dunaway v. New York*, *supra*, is presented by the INS factory survey procedure. Although the appellants and other workers are surrounded by investigators placed at exits, and most workers are subjected to at least a visual perusal by investigators, if not actual questioning, the detentive nature of the factory survey, while intrusive, does not rise to the intrusive level of the traditional arrest found in *Dunaway*. Dunaway was escorted to police headquarters in a police vehicle and placed in an interrogation room although the officers did not have probable cause for his arrest. The Court

noted that even though Dunaway was not informed that he was under arrest at the time he was originally placed into the custody of the officers, the facts suggested that his detention rose to the level of a traditional arrest requiring the general standard of probable cause that Dunaway had committed the crime under investigation.

The facts of the present case do not suggest an arrest because the record indicates that none of the workers was handcuffed or placed into custody until the investigators had sufficient probable cause to suspect that those in custody were in this country without proper documentation. We therefore find *Dunaway* inapposite.

However, we must agree that the procedure used by the INS involves more than mere questioning or casual conversation as argued by the INS.[9] Our reading of the record in this case leads us to the conclusion that the execution of the factory surveys, while not rising to the level of an arrest requiring the general rule of probable cause, sufficiently intrudes upon the privacy and security interests of the workers that a seizure of the workforce occurs during the surveys.

This court's test to determine whether the factual circumstances of law enforcement activity rise to the level of a seizure under the Fourth Amendment is found in *United States v. Anderson*, 663 F.2d 934 (9th Cir. 1981):

> "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the

[9] The INS directs our attention to the oft-quoted statement in *Terry v. Ohio*: "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons." 392 U.S. at 19 n.16, 88 S.Ct. 1868 at 1879, 20 L.Ed.2d 889. The facts of this case suggest that questioning during the factory surveys was other than casual, personal intercourse between workers and INS investigators.

> circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."

Id. at 939, (*quoting United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, at 1877, 64 L.Ed.2d 497 (1980) (opinion of Stewart, J.)). Although this court in *Anderson* noted that the above-quoted test was stated only in the plurality opinion of Justice Stewart in *Mendenhall* (joined only by Rehnquist, J.), the court proceeded to apply the test to the facts of *Anderson*, holding that a seizure was present in that case. 663 F.2d at 939-40. We will apply the above-quoted test to the facts of this case to determine whether the events taking place during the factory surveys at the Davis and Mr. Pleat factories rose to the level of a Fourth Amendment seizure.

Before applying the test, however, we must recognize that a federal district court has concluded that the "INS's policy of stationing agents at all exits during area control operations, in order to secure the premises and prevent persons whom the agents have probable cause or reasonable suspicion to believe are aliens from leaving the premises during the operation . . . results in 'seizures' for purposes of the fourth amendment." *Illinois Migrant Council v. Pilliod*, 531 F.Supp. 1011, 1018 (N.D.Ill. 1982), granting summary judgment and permanent injunction as to this issue on remand from *Illinois Migrant Council v. Pilliod*, 398 F.Supp. 882 (N.D.Ill.1975), *aff'd.* 540 F.2d 1062 (7th Cir. 1976), *modified as to remedy*, 548 F.2d 715 (7th Cir. 1977) (en

banc).[10] The instant case contains evidence of similar INS policy of stationing agents at the factory exits and entrances for similar purposes. While speaking in general terms about the area control operations performed in the Los Angeles area, the Assistant District Director for Investigations at the Los Angeles office of the INS stated that "[o]fficers are usually stationed at various entrances and exits in order to guarantee that individuals will not escape." Affidavit of Philip Smith, at 3, attached as Exhibit B to Defendant's Memorandum in Support of Defendants' Motion to Dismiss, C.R. 14.

In *Pilliod*, the district court concluded that the "record reveals that the agents do in fact surround and detain all persons on the premises during control operations." 531 F.Supp. at 1018. That court also noted:

> "The entire purpose of the policy of 'securing the premises' is to ensure that the agents 'control' the aliens during the course of the 'control operation.' The agents stationed at the exits are specifically instructed to prevent from leaving those individuals they suspect are aliens. The record reveals that the agents do in fact surround and detain all persons on the premises during control operations."

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[10] The district court also denied both parties' motions for summary judgment and sent to trial the issue of whether the INS policy of stopping and questioning during street encounters amounts to a seizure. The court granted the INS' motion for summary judgment on the issue of whether the INS should be enjoined from the use of "dragnet" search warrants since the INS had informed the court that the agency had abandoned its policy of obtaining such warrants. Finally, the district court refused to modify the preliminary injunction at the request of the INS in order to allow the INS to use civil administrative warrants based upon the D.C. Circuit's ruling in *Blackie's House of Beef v. Castillo*, 659 F.2d 1211 (D.C.Cir. 1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 1432, 71 L.Ed.2d 651 (1982), stating that "[w]arrants to search premises simply do not authorize the seizure of persons found on the premises." *Pilliod*, 531 F.Supp. at 1020. *See also, id.*, at n.19.

Id. In response to INS arguments that the workers subjected to the area control operations voluntarily cooperated with the INS questioning and that the workers were never made aware of any limitation upon their movement by the presence of the agents stationed at the exits, the court in *Pilliod* remarked:

> "Indeed, the entire notion of preventing people from leaving a given area, and 'securing' that area, requires that the agents rely on their authority, if not actual threats of force, to restrict freedom of movement and the 'freedom to walk away.'
>
> . . . .
>
> "[T]he entire notion of 'securing the premises' necessarily implies that those on the premises are made aware of the presence of INS agents.
>
> . . . .
>
> "Indeed when agents are stationed at points of egress, it is only reasonable to infer that they are there in order to restrict egress. . . . This limitation on the freedom to walk away means that a seizure has occurred for purposes of the fourth amendment."

531 F.Supp. at 1019 (citations omitted).

We think the reasoning of the *Pilliod* court is persuasive.[11] The facts suggesting a seizure of the workforce in this case mirror the facts involved in the factory sur-

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[11] The stationing of INS agents at factory exits was also present in the search of the H & H factory in *Babula v. INS*, 665 F.2d 293, 294 (3d Cir. 1981). However, the Third Circuit did not reach the question of whether the agents' presence at the exits in that case rose to a seizure implicating the Fourth Amendment, quite possibly since the court in that case had already determined in *Lee v. INS*, 590 F.2d 497 (3d Cir. 1979), that any questioning of workers pursuant to 8 U.S.C. § 1357(a)(1) is "limited by the restrictions of the fourth amendment." 665 F.2d at 295. The court in *Babula* held that the questioning of all of the factory workers at the H & H facility was justified by the "suspicions on the milieu in which the workers were found." 665 F.2d at 296.

veys that were the subject of the injunction in *Pilliod*. From the record in this case, we additionally observe that it appears that the stationing of the agents at exits and entrances is an integral feature of the successfully executed factory survey. The surrounding and securing of exits, the obvious function of which is to produce a captive workforce, in combination with the element of surprise, directly leads to many of the desired apprehensions. The total number of apprehensions would doubtless be reduced if the INS did not surround the facility surveyed in order to apprehend those attempting to flee. This flight of workers at a factory survey is a common occurrence as observed by INS investigators, as well as the appellants. We find unpersuasive the INS argument here that detention does not result from the execution of factory surveys where the use of detentive techniques significantly contributes to the apprehensions sought.

Nevertheless, the INS relies upon *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), for the proposition that the detention, if any, that existed during the surveys did not rise to the level of a seizure contemplated by the Fourth Amendment. In *Mendenhall*, Justice Stewart, joined only by Justice Rehnquist, held that the stop and questioning by Drug Enforcement Agency (DEA) agents of Mendenhall in the public concourse of the Detroit Metropolitan Airport did not amount to a seizure of Mendenhall's person, implicating the Fourth Amendment. We fail to find *Mendenhall* dispositive of the seizure issue in this case.

First, as admitted by the INS in its brief, the conclusion that no seizure occurred in *Mendenhall* was shared only by two justices. Three other justices (Powell, Chief Justice Burger, and Blackmun) did not reach the seizure issue since it had not been raised in the courts below, but concurred in the result finding that the DEA

agents had articulable and reasonable grounds for believing that Mendenhall was engaged in criminal activity. Although this court has adopted the test for seizure as enunciated in the Stewart opinion in *Mendenhall*, that test had never been adopted by a majority of the Supreme Court, nor has a majority of the latter court decided whether stopping and questioning of persons matching "drug courier profiles" in airport concourses amounts to a seizure protected by Fourth Amendment standards. *See also Reid v. Georgia*, 448 U.S. 438, 100 S.Ct. 2752, 65 L.Ed.2d 890 (1980).

Second, even if the Court had decided that the minimal intrusions involved in *Mendenhall* and *Reid v. Georgia* did not constitute seizures, we would be compelled to view the detention and questioning of the workforces in the present case as far more intrusive. In *Mendenhall*, Justice Stewart concluded that Mendenhall "was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions." 446 U.S. at 555, 100 S.Ct. at 1878. The Court concluded:

> "[N]othing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way, and for that reason we conclude that the agents' initial approach to her was not a seizure."

446 U.S. at 555, 100 S.Ct. at 1878. When comparing *Mendenhall* to this case, we note that, in addition to being questioned as to their citizenship status, the workers at the factory in the present case were subjected to a procedure that included the intrusive aspects noted throughout this opinion; i.e., the threatening presence of a number of INS investigators, some stationed at exits, others carrying out the survey by proceeding methodically down the rows of workers.

The detentive environment created in the surveyed factories in this case is quite different from the casual stopping and questioning involved in *Mendenhall*, *Reid v. Georgia*, and our recent decision in *United States v. Beale*, 674 F.2d 1327, 1329-30 op. at 1671, 1673-74 (9th Cir. 1982).

Nor do we find *Cuevas-Ortega v. INS*, 588 F.2d 1274 (9th Cir. 1979), and *Cordon de Ruano v. INS*, 554 F.2d 944 (9th Cir. 1977), helpful to the INS' position that no seizure occurred. Those two cases involved no Fourth Amendment violation when illegal aliens were voluntarily questioned in their homes. As is the case with *Mendenhall* and *Reid v. Georgia*, the level of detention and show of authority involved in *Cuevas-Ortega* and *Cordon de Ruano* simply do not match that involved in the present case.

The INS also cites to *Yam Sang Kwai v. INS*, 411 F.2d 683 (D.C.Cir.) *cert. denied*, 396 U.S. 877, 90 S.Ct. 148, 24 L.Ed.2d 135 (1969), for the proposition that seizures must be personal and not general, the implication being that the stationing of agents at the exits in the present case could only rise to a general detention or seizure not cognizable as a Fourth Amendment seizure of each worker. We disagree.

Yam Sang Kwai does not advance the INS' position. *Yam Sang Kwai* involved a petitioner's argument that he was arrested the moment agents surrounded the outside of the restaurant where he was employed. Yam Sang Kwai never saw any of these agents until he was personally confronted. The D.C. Circuit rejected such an *ex parte* arrest notion, observing that a seizure must contain some element by which the seized person is made aware that personal liberty has been restrained. 411 F.2d at 686. The petitioner in *Yam Sang Kwai* was not aware of the agents' actions outside the restaurant and was arrested only after being personally confronted by an investigator who subsequently discovered proba-

ble cause for Yam Sang Kwai's arrest. In the present case, by contrast, the appellants noticed the presence of the INS at the factories immediately as the survey began. The appellants indicated that they were aware that the agents stationed at the exits physically prevented many workers from leaving. In addition, the number of INS investigators, wearing badges and carrying handcuffs, gave the workers the impression that they were tacitly under the detentive powers of the INS for the duration of the survey. Whatever lack of awareness Yam Sang Kwai had is not present on the record before us. Viewing the record with all inferences drawn in favor of the appellants, as is our obligation under our standard of review, we must conclude that the workers at the plants surveyed in this case were aware immediately of the detentive nature of the survey prior to any personal confrontation or interrogation.

Directly addressing the test for Fourth Amendment seizure as stated in *Anderson*, *supra*, the record indicates that regardless of the fact that some of the four named appellants had varying degrees of freedom to circulate through or exit the factories, the number of INS investigators employed during the surveys and the method of survey execution represented a threatening presence of INS agents to the reasonable worker. The investigators' authority was announced verbally and the display of INS badges worn by the investigators served as a continual reminder of that authority. Agents stationed at exits indicated to the entire workforce that departures were not to be contemplated. Some agents carried handcuffs and used them to detain those apparently suspected of being in this country illegally. The operation unfolded with surprise and resulted in sustained disruption of the working environment. The element of surprise was used to prevent undetected departures, and the methodical execution of the operation with a line of agents proceeding down the

rows of workers could reasonably be viewed as a threatening presence. Under these circumstances, we must conclude that even before individual questioning began, a reasonable worker "would have believed that he was not free to leave." *Anderson, supra*, 663 F.2d at 939. We therefore hold that the manner in which the factory surveys were conducted in this case constituted a seizure of the workforce implicating the Fourth Amendment.

2. The Fourth Amendment Prohibits Detentive Questioning of a Workforce Unless INS Investigators Can Articulate Objective Facts and Rational Inferences From Those Facts That Warrant a Reasonable Suspicion That Each Questioned Person is an Alien Illegally in this Country.

Having determined that a seizure of the workforce occurs during the factory surveys, our next task is to determine the constitutional standard applicable to the INS conduct.

The INS argues that even if a seizure implicating the Fourth Amendment is found, that the intrusion upon the privacy and security interests of the appellants was so slight as to constitute no Fourth Amendment violation, relying upon *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976).[12]

[12] The INS position, in the event we find, as we do, that *Martinez-Fuerte* is inapplicable, apparently is a concession that the Fourth Amendment requires agents to articulate a reasonable suspicion of illegal alienage for detentive questioning. The INS provided the district court with excerpts from the INS Handbook "M-69" entitled "The Law of Search and Seizure for the Immigration Officer," published by the United States Department of Justice, Immigration and Naturalization Service. The Handbook states:

> "To stop and question a person encountered in establishments such as restaurants, factories, or hospitals, or beyond 25 miles from any external boundary of the United

The appellants, however, maintain that *Dunaway, supra*, requires the INS to question only those it may have probable cause to arrest during the factory surveys and, in the alternative, for the application of a standard comparable to that applied to automobile stops in *Brignoni-Ponce*. The appellants argue that an element of illegality and an element of individualized suspicion are required for sufficient protection of the Fourth Amendment rights of the workers. We agree with the appellants.

In other factual contexts, the Supreme Court has held that for an investigatory seizure or brief detention to be justified, law enforcement officials must be able to point to articulable and objective facts that the particular person being stopped or detained is suspected of criminal activity. *United States v. Cortez*, 449 U.S. at 417, 101 S.Ct. at 695, and cases cited therein. The above standard is an application of the "ultimate

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States, regarding his right to enter or remain in the United States, an officer must have a reasonable suspicion based on specific articulable facts and rational inferences drawn from those facts that the person is an alien. *However, to detain such a person, the officer must have a reasonable suspicion that he is an alien illegally in the United States.*"

Memorandum in Support of Defendants' Motion for Summary Judgment, Exhibit H, at 64, C.R. 112 (Footnotes omitted, emphasis added). "Detention not amounting to arrest" is defined as "Temporary forcible restraint, usually for the purpose of conducting further investigation." *Id.* at 61. A reasonable suspicion that a person is an alien illegally in this country:

> "may be based on such factors as the officer's knowledge of a high concentration of illegal aliens in the area or of recent illegal border crossings, a specific tip from a reliable informant, the subject's excessive-nervousness or studied nonchalance upon being in the presence of or questioned by an immigration officer, or the subject's admissions."

Id. at 60-61.

Whether the suggested factors sufficiently meet the constitutional standard is another question which we take up in section IV.3 of this opinion.

standard of reasonableness embodied in the Fourth Amendment," *Michigan v. Summers*, 452 U.S. at 699-700, 101 S.Ct. at 2592-93, and, with the exception of *United States v. Martinez-Fuerte*, requires law enforcement officials to have a reasonable, individualized suspicion that the particular person being detained is engaged in wrongdoing. *United States v. Cortez*.

This appeal presents two difficult issues regarding the constitutional standard applicable to INS citizenship status questioning during factory surveys. The first issue is created by an open question noted by the Supreme Court; i.e., whether citizenship status questioning is constitutionally valid when based upon a suspicion of alienage alone. The second issue is a question whether less than an individualized suspicion is sufficient for questioning workers present in a factory known to employ illegal aliens. We decide the first question by holding that a suspicion of alienage alone is insufficient. We answer the second by noting that case law in other contexts requires an individualized suspicion to justify investigatory seizures and detentions and should also be required in the context of the INS factory survey.

a. The Fourth Amendment Requires a Reasonable Suspicion That Those Detained and Questioned are in this Country Illegally.

In *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), the Supreme Court announced the Fourth Amendment standard applicable to non-border vehicular stops:

> "Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be *illegally in the country*."

422 U.S. at 884, 95 S.Ct. at 2582 (emphasis added).

As for non-vehicular stops and questioning, the Court noted:

> "[W]e reserve the question whether Border Patrol officers also may stop persons reasonably believed to be aliens when there is no reason to believe they are illegally in the country. *See Cheung Tin Wong v. INS*, 152 U.S.App.D.C. 66, 468 F.2d 1123 (1972); *Au Yi Lau v. INS*, 144 U.S.App.D.C. 147, 445 F.2d 217, *cert. denied*, 404 U.S. 864, 92 S.Ct. 64, 30 L.Ed.2d 108 (1971). The facts of this case do not require a decision on the point."

422 U.S. at 884 n.9, 95 S.Ct. at 2582 n.9. The stopping[13] and questioning of persons as opposed to the stopping of vehicles is, of course, the question directly presented in the instant case.

Since *Brignoni-Ponce*, various courts of appeal have struggled with the answer to the question reserved in footnote 9 quoted above. The D.C. Circuit cases cited by the Court in footnote 9 of *Brignoni-Ponce* have established the benchmark standards from which the rules in other circuits seem to have evolved. The D.C. Circuit has consistently adhered to the rule that an INS agent, pursuant to statutory authority under section 287(a)(1) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1357(a)(1),[14] may question a person as to his right to be or remain in the United States without forcible detention as long as the agent has a reasonable belief that the questioned person is an alien; *Yam Sang*

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[13] We will assume that the statement referring to "stopping" applies to the facts indicating a detention in this case.

[14] Section 287(a)(1) of the Act, 8 U.S.C. § 1357(a)(1) provides:

> "Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have the power without warrant—
>
> "(1) To interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States; . . ."

Kwai v. INS, *supra*, and *Blackie's House of Beef v. Castillo*, 659 F.2d 1211, 1226 (D.C.Cir.1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 1432, 71 L.Ed.2d 651 (1982); but agents may forcibly detain a person temporarily for questioning "under circumstances creating a reasonable suspicion, not arising to the level of probable cause to arrest, that the individual so detained is illegally in this country." *Au Yi Lau v. INS*, 445 F.2d 217, 223 (D.C.Cir.1971), *cert. denied*, 404 U.S. 864, 92 S.Ct. 64, 30 L.Ed.2d 108 (1971). *See also*, *Ojeda-Vinales v. INS*, 523 F.2d 286 (2d Cir. 1975). This dual standard thus imposes both a constitutional limitation and a statutory limitation upon the conduct of INS agents. If the nature of the agent's conduct employed during the questioning of a suspected alien amounts to a seizure implicating the Fourth Amendment, an INS agent must articulate a reasonable suspicion that the questioned person is an alien illegally in this country. If no seizure is employed, the agent need not articulate reasons to suspect the illegal presence of the person questioned, only a reasonable belief in the questioned person's alienage, the authority granted the INS agent by section 1357(a)(1). Until recently, both standards have been interpreted to require a particularized or individualized suspicion or belief regarding each questioned person in order to justify the intrusion resulting from the questioning.[15]

The *Au Yi Lau* and *Yam Sang Kwai* shifting standards based upon the degree of detention involved during INS citizenship status questioning appear to be the standards presently employed in the Seventh Circuit, *Illinois Migrant Council v. Pilliod*, 548 F.2d 715

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[15] *See Babula v. INS*, 665 F.2d 293, 295 (3d Cir. 1981) (less than an individualized suspicion, but one based upon the "suspicions on the milieu in which the [questioned] workers were found," is sufficient to justify questioning under 8 U.S.C. § 1357(a)(1)).

(7th Cir. 1977) (en banc). However, such shifting standards, when applied to street encounters, were rejected forcefully in *Marquez v. Kiley*, 436 F.Supp. 100, 113-114 (S.D.N.Y., 1977).[16] The dual standard was also modified in *Lee v. INS*, 590 F.2d 497 (3d Cir. 1979), where the Third Circuit criticized the fine line drawing required to distinguish detentive from nondetentive questioning, and adopted a standard which combines the detention inquiry with the justification inquiry. The standard currently employed in the Third Circuit asks whether the INS stopping and questioning was reasonably related in scope to the justification for its initia-

[16] In *Marquez*, the district court observed:

"[W]hatever theoretical appeal there may be to a rule which permits casual, voluntary questions upon suspicion of alienage alone, but requires suspicion of illegality for detention, is in our view substantially undermined by the realities of the matter. It is in the nature of an oxymoron to speak of 'casual' inquiry between a government official, armed with a badge and a gun and charged with enforcing the nation's immigration laws, and a person suspected of alienage. This is particularly so in the context of area control operations as described at trial. In such situations a suspect alien is suddenly confronted by INS officers who have just driven up in an automobile, left the car and directly approached, and immediately queried as to his nationality. For a constitutional rule in these matters to depend on the 'voluntary cooperation' of the suspect is to impose a gloss upon real life. When it is further considered that refusal to cooperate or an attempt to evade such a 'casual encounter,' indeed, even the appearance of nervousness, may well be held to provide reasonable grounds to suspect unlawful presence and therefore to authorize forcible detention, see, e.g., *Au Yi Lau v. INS*, *supra*, 445 F.2d at 220; cf. *United States v. Oates*, 560 F.2d at 45 (2d Cir. 1977) (and cases cited there), the rule urged upon us by the government appears unworkable. Although application of the Fourth Amendment requires courts at times to develop artificial constructs which can never precisely conform to the fluid and infinitely various nature of contacts between government officers and the populace, in formulating such rules a court should not ignore the realities of everyday life."

tion. *Id.* at 502; *see also Babula v. INS*, 665 F.2d 293, 295 (3d Cir. 1981) (applying the *Lee* standard, but allowing less than an individualized suspicion to be sufficient for citizenship status questioning).[17]

The Ninth Circuit standard is more in doubt. In *Cordon de Ruano v. INS*, 554 F.2d 944 (9th Cir. 1977), this court rejected an alien's argument that her Guatemalen passport, voluntarily given to INS agents during nondetentive questioning of her, should have been suppressed at her deportation hearing. This court noted that the passport was not illegally seized because the petitioner, Cordon de Ruano, was not "stopped" or "detained," and quoted dicta from *United States v. Brignoni-Ponce*, *supra*, as the established rule that "the INS may not stop or detain persons to question them about their citizenship 'on less than a reasonable suspicion that they may be aliens.' " 554 F.2d at 946, *quoting Brignoni-Ponce*, 422 U.S. at 884, 95 S.Ct. at 2582, 45 L.Ed.2d at 618. Conspicuously absent from the quoted rule is any requirement that the INS agents suspect that the questioned person is in this country illegally. That the quoted rule is dicta is made apparent by footnote 9 in *Brignoni-Ponce*, where the Court reserved the question "whether Border Patrol officers also may stop persons reasonably believed to be aliens when there is no reason to believe they are illegally in the country." *Id.* Since *Cordon de Ruano* did not require an elicitation of the suspicion standard for stopping and questioning persons since the court found no stop or detention, the case should be read only in aid of determining when a stop and/or detention has occurred which would invoke the appropriate constitutional standard.

A year after the decision in *Cordon de Ruano*, this court found evidence sufficient for the creation of

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[17] See discussion of *Babula* at section IV.2.b. of this opinion.

"founded suspicion to detain" suspected aliens under section 1357(a), citing the D.C. Circuit cases of *Au Yi Lau*, *supra*, and *Yam Sang Kwai*, *supra*. *Cabral-Avila v. INS*, 589 F.2d 957, 959 (9th Cir. 1978), *cert. denied*, 440 U.S. 920, 99 S.Ct. 1245, 59 L.Ed.2d 472 (1979). The court in *Cabral-Avila*, assuming, without deciding, that probable cause was necessary prior to arrest of the petitioners in that case, held that the "founded suspicion that these persons were *illegal* aliens ripened into probable cause...." *Id.* at 959 (emphasis supplied). *Cabral-Avila* can be read consistently with *Au Yi Lau* to require a suspicion of *illegal* alienage before detention is permitted.

Following *Cabral-Avila*, this court was again called upon to decide whether the non-detentive questioning of an illegal alien at the threshold of her apartment, where she freely admitted her illegal alienage, was violative of the Fourth Amendment. *Cuevas-Ortega v. INS*, 588 F.2d 1274 (9th Cir. 1979). As in *Cordon de Ruano*, the court found no seizure or detention implicating the Fourth Amendment. In a footnote, the *Cuevas-Ortega* court explained that in a situation in which a seizure is involved, "a non-border stop or detention to question a suspected illegal alien about his citizenship requires "reasonable suspicion." *Id.*, 588 F.2d at 1277. The latter expression of the standard required for stopping and questioning can also be construed to require a reasonable suspicion of *illegal* alienage because of the immediate reference to *Brignoni-Ponce* in the footnote and because the language expressing the standard mentions illegal alienage.

More recently, this court affirmed a district court order suppressing a document which was the basis for an indictment under 18 U.S.C. § 1426(b) for use of forged immigration documents, because the document was elicited from the defendant under circumstances in

which the INS agents failed to articulate "sufficient independent grounds to suspect [the defendant] of being an *illegal* alien." *United States v. Heredia-Castillo*, 616 F.2d 1147-49 (9th Cir. 1980) (Merrill, J., dissenting) (emphasis supplied). the court concluded that the agents had sufficient justification for stopping the vehicle under *Brignoni-Ponce*, but the majority decided that after the agents had discovered the driver of the vehicle to possess proper papers, the agents had insufficient justification for questioning the passenger, Heredia-Castillo. After discounting most of the government's proffered justifications for questioning Heredia-Castillo, the court noted that only two factors were supported by the record: that Heredia-Castillo was found in an area in which illegal aliens were frequently found, and that he appeared to be of Mexican ancestry. Those two observations were insufficient to justify the questioning of Heredia-Castillo. Discussing the latter factor, this court noted:

> "The government has enumerated several facts which might cast a certain suspicion on every person in the area who appeared to be of Mexican ancestry. Under the record before us, such a generalized suspicion is not sufficient for us to overturn the trial court's ruling."

616 F.2d at 1150.

Heredia-Castillo is significant for a number of reasons. First, since the court held that the vehicle was properly stopped based upon the agents' reasonable suspicion that the driver might be an illegal alien (emphasizing the factor that one of the agents recognized the driver as a man he had previously been arrested for being illegally in the country), the court was not willing to transfer this justification for the additional detention and questioning of the vehicle's passenger when the driver was found to be in the country legally. For this, the court required sufficient independent

grounds to suspect Heredia-Castillo of being an illegal alien—an individualized suspicion. Since Heredia-Castillo was already physically stopped when the INS agents focused their questions upon him, the court then applied the standard of founded suspicion to suspect illegal alienage to justify continued detention and questioning. For this, the agents were not allowed to focus merely upon Heredia-Castillo's apparent Mexican ancestry and the fact that he was present in an area known to contain illegal aliens—such a generalized suspicion is insufficient for further detention and questioning.

Finally, this court interpreted section 1357(a)(1) in *Tejeda-Mata v. INS*, 626 F.2d 721 (9th Cir. 1980), in a way that suggests that section 1357(a)(1) must be interpreted consistently with the Fourth Amendment if a seizure is involved. The court in *Tejeda-Mata* recited the language of section 1357(a)(1) and cites to *Ojeda-Vinales*, *supra* *Cheung Tin Wong*, *supra*, and *Au Yi Lau*, *supra*. As discussed above, those cases all require an agent to articulate a reasonable suspicion of *illegal* alienage before detentive questioning can occur. In *Tejeda-Mata*, the court refused to suppress the alien's admission of alienage, noting that the petitioner was not arrested or threatened with curtailment of his liberty, *citing Cordon de Ruano*, *supra*.[18]

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[18] Having concluded that no seizure was involved in *Tejeda-Mata*, the court went on to explain the reasonableness under section 1357(a)(1) of the Immigration Officer's belief as to Tejeda-Mata's alienage justifying the interrogation that took place in that case. The courts discussion as to the statutory standard in *Tejeda-Mata* could be regarded simply as dicta or it could be seen as this court's acknowledgment that immigration officials, in the absence of a constitutional violation, must meet the statutory standard requiring a reasonable belief in the questioned person's alienage. Since the facts in this case do not require a decision regarding the statutory standard, we decline to clarify the discussion of section 1357(a)(1) in *Tejeda-Mata*.

Our reading of the case law in this circuit regarding detentive questioning by the INS as discussed immediately above requires us to hold that INS investigators may not seize or detain workers for citizenship status questioning unless the investigators are able to articulate objective facts providing investigators with a reasonable suspicion that each questioned person, so detained, is an alien illegally in this country.

The element of illegality contained in the standard has been suggested by recent Court pronouncements of Fourth Amendment standards applicable to brief detentions short of formal arrests. In *Michigan v. Summers*, the Court discussed its precedent permitting minimal intrusions and stated:

> "These cases recognize that some seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause, *so long as police have an articulable basis for suspecting criminal activity.*"

452 U.S. at 699, 101 S.Ct. at 2592 (emphasis added). In *United States v. Cortez, supra*, the Court stated that "the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." 449 U.S. at 417-18, 101 S.Ct. at 694-95.[19]

The element of illegality contained in the standard is also required in order to minimize the effects of en-

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[19] *See also Brown v. Texas:*

> "[E]ven assuming that [prevention of crime] is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it."

Id. 443 U.S. 47, 52, 99 S.Ct. 2637, 2641, 61 L.Ed.2d 357 (1979).

forcement procedures felt by innocent workers. Our focus is not limited to a discussion of the rights of aliens. As the Court noted in *Brignoni-Ponce*:

> "Although we may assume for purposes of this case that the broad congressional power over immigration, ... authorizes Congress to admit aliens on condition that they will submit to reasonable questioning about their right to be and remain in this country, this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens."

422 U.S. at 883-84 (citations omitted). The status of alienage does not imply that any particular aliens is in this country illegally. An alien, as either an immigrant or non-immigrant, may be in this country in total compliance with the immigration laws. Reliance upon section 1357(a)(1) therefore is insufficient. Although the statute is silent as to any requirement of suspicion of illegal presence, to assert that section 1357(a)(1) justifies the detentive questioning of an entire workforce simply ignores the truism that innocent citizens and aliens legally employed at surveyed factories enjoy the same right to be free of the indignity of arbitrary government intrusions which the Fourth Amendment guarantees all individuals. *See, e.g., Delaware v. Prouse*, 440 U.S. 648, 653-54, 99 S.Ct. 1391, 1395-96, 59 L.Ed.2d 660 (1979).

We realize that our holding here limits section 1357(a)(1) questioning in the context of factory surveys of the nature presented by the facts of this case. But this is not the first time the statute has been so limited. The Court has held that section 1357(a)(1) cannot justify a constitutional violation, *Brignoni-Ponce, supra*; and we are mindful of the Court's more general admonition that "no Act of Congress can authorize a violation of the Constitution." *Almeida-Sanchez v. United States*, 413 U.S. 266, 272, 93 S.Ct. 2535, 2539, 37 L.Ed.2d 596 (1973). In view of the above, and the par-

ticular facts involved in this case, we think that a standard allowing detentive questioning on a suspicion of alienage alone would diminish the privacy and security interests of both citizens and aliens legally in this country. Random detentive questioning of all who may appear to be aliens without objective facts giving rise to a suspicion of illegal alienage would grant the INS impermissible discretion to detain and question at whim. *See Delaware v. Prouse, supra.*

b. The Fourth Amendment Requires an Individualized Suspicion of Illegal Alienage of Those Subject to Detentive Questioning.

As with the illegality requirement of the standard, detentive questioning, if not based upon an individualized, articulable suspicion, would be impermissibly random. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); *Heredia-Castillo, supra.*

The INS contends that individualized suspicion is not required. The INS relies upon *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976), arguing that even if a seizure were present during the factory surveys, that it was minimal; and, consequently, the government's interest in apprehending illegal aliens outweighs any interest of the questioned workers to be free from this minimal intrusion. In *Martinez-Fuerte*, the Supreme Court sanctioned the practice of the Border Patrol at permanent checkpoints to refer some vehicles to a secondary inspection area for additional questioning of citizenship status of the passengers of the vehicle on less than a particularized or individualized suspicion as to each person subjected to the referral, noting that "the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion." *Id.*, 428 U.S. at 543, 96 S.Ct. at 3074. The requirement of individualized suspicion was not imposed in *Martinez-Fuerte* because the re-

sulting intrusion of the permanent checkpoint stops on the interests of the motorists was minimal and outweighed by the substantial law enforcement interests involved. The INS argues that the intrusion, if any, in the instant case, is less than that permitted in *Martinez-Fuerte*, and that the same governmental interest in enforcement of the immigration laws makes it permissible for the INS to question factory workers on less than an individualized suspicion.

The appellants, on the other hand, find *Martinez-Fuerte* inapplicable. The appellants emphasize the Court's limited holding in *Martinez-Fuerte* to permanent checkpoints because motorists at these checkpoints are not taken by surprise and that the routine operation of the checkpoints involves little discretionary law enforcement. 428 U.S. at 559, 96 S.Ct. at 3083. The appellants argue that the facts of the instant case are more like a roving border patrol stop than a permanent checkpoint, contending that the individualized suspicion standard imposed in *Brignoni-Ponce* should apply here. We must agree with appellants.

Although we recognize the weighty law enforcement interests involved,[20] the language in *Martinez-Fuerte* is more supportive of the appellants' position than that of the INS. In discussing the differences between a permanent checkpoint stop and a roving patrol stop in *Martinez-Fuerte*, the Court noted that while the objective intrusion (the stop itself, the questioning and visual inspection) was similar in both cases, the subjective intrusion (concern or fright on the part of lawful travelers) in a roving stop was much greater. The Court noted that when compared with a roving patrol stop, the permanent checkpoint stop was much less intrusive because motorists were not taken by surprise and that

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[20] *See, e.g.*, the discussion of the law enforcement problem involved in *Martinez-Fuerte, supra*, 428 U.S. at 551-53, 96 S.Ct. at 3080.

checkpoint operations "both appear to and actually involve less discretionary enforcement activity." 428 U.S. at 559, 96 S.Ct. at 3083. Commenting on the procedure of selective referral at the checkpoints, the Court stated:

> "Selective referral may involve some annoyance, but it remains true that the stops should not be frightening or offensive because of their public and relatively routine nature."

428 U.S. at 560, 96 S.Ct. at 3084. In comparison to that statement, the record in the instant case contains evidence that the factory surveys were quite frightening to the workers, leaving many in a state of anxiety over perceived recurrence of the surveys and subsequent arrests. Instead of the three or four minute routine detention of lawful motorists at the permanent checkpoint in *Martinez-Fuerte*, the record in this case indicates a relatively greater degree of disruption from the surprise entry of the workplace for the typical hour and one-half of questioning and for some time thereafter. Moreover, the actual implementation of the factory surveys in the instant case suggests more random enforcement, giving agents greater discretion than is involved in the checkpoint operation. By securing exits and systematically proceeding in a line down rows of workers, the INS factory survey compares more to an unannounced automobile checkpoint located and operated by surprise wherein all motorists are detained for an hour and one-half, while the agents systematically scrutinize all detained motorists and passengers, choosing those the agents wish to question. The factors involved in a permanent checkpoint on highways that balance against impermissible discretionary law enforcement, i.e., no surprise, short duration, minimal disruption, are simply not present in the instant case. The factory survey in which an entire workforce is detained and subjected to INS scrutiny, a survey requir-

ing the element of surprise in order to be successful, is an operation presenting serious dangers to the Fourth Amendment rights of citizens and legal alien workers. Such a survey cannot be considered to be as minimally intrusive as a permanent checkpoint stop. We therefore reject the notion that *Martinez-Fuerte* allows factory survey questioning of individual workers on less than a particularized or individualized suspicion of each worker questioned.

By rejecting the *Martinez-Fuerte* analogy, we necessarily reject *Babula v. INS*, 665 F.2d 293 (3d Cir. 1981), to the extent that case stands for the proposition that factory survey questioning is constitutionally permissible on less than a particularized suspicion. In *Babula*, the INS had received information from a reliable source that H & H Industries at Pennsauken, New Jersey, had employed illegal aliens. The information listed seven named Polish aliens and the source informed the INS that the company had employed additional unnamed illegal aliens. INS records suggested that six of the seven named persons were not subject to deportation. After deciding that the H & H Factory would be a feasible location for an "area control operation," the INS agents carried it out by using six agents, three posted at the exits of the factory "to prevent anyone from leaving the factory," and three entered the factory. Upon entry, the agents spoke with the general manager and the night foreman, inquiring about the seventh named, suspected illegal alien, and were informed that this person no longer worked at the factory. Thus, with no information as to any particular named persons who were suspected of being in the country illegally, the agents began questioning workers in the factory as to their citizenship status and whether they had the proper papers. Ten workers were arrested. All petitioners in the *Babula* case were found deportable by an immigration judge, the deportation

orders subsequently being affirmed by the Board of Immigration Appeals.

One of the issues raised by the petitioners in *Babula* was whether the agents had violated their Fourth Amendment rights by questioning them at the factory pursuant to 8 U.S.C. § 1357(a)(1). The Third Circuit had held previously that section 1357 was limited by the restrictions of the Fourth Amendment. *Lee v. INS*, 590 F.2d 497, 499-500 (3d Cir. 1979). Reaching the merits of the Fourth Amendment contention, the Third Circuit in *Babula* noted:

> "[I]n this case the agents had observed nothing specifically about each person questioned, but rather based their suspicions on the milieu in which the workers were found. We hold that the tip from a reliable source about the employment of illegal Polish aliens, combined with the indicia that H & H did employ Polish aliens, are sufficient to justify the minimally intrusive questioning that the agents conducted."

665 F.2d at 296. The court proceeded to justify its "milieu" standard by indicting that "individualized suspicion is not required ... when 'we deal neither with searches nor with the sanctity of private dwellings.' " *Id.* The court also emphasized that the INS agents were not allowed unfettered discretion because "all the employees rather than a selection of them" were questioned at H & H. *Id.* at 296-97.

We have serious problems with the *Babula* reasoning and find it inapposite to the facts of this case. The questioning of workers at the H & H facility on less than an individualized suspicion that each questioned worker was an illegal alien appears to be a departure from the suspicion required in the Third Circuit's own case of *Lee v. INS*, *supra*. Even though *Lee* rejected the dual, constitutional/statutory standard based upon the degree of detention involved that is the standard suggested in *Pilliod*, *Au Yi Lau* and *Yam Sang Kwai*, the

facts of *Lee* required the Third Circuit to determine that the INS agent had sufficient articulable facts concerning Lee individually that the scope of the detention in that case was reasonably related to the justification for its initiation. *See* dissenting opinion of Adams, J.; 665 F.2d at 300. *Babula* now extends the rule to situations in which the INS can prove the reasonableness of the questioning based upon information that the factory has employed illegal aliens in the past. For this holding, the Third Circuit notes that although " 'some quantum of individualized suspicion is usually a prerequisite to a constitutional search and seizure, [there is] no irreducible requirement of such suspicion . . . .' " *Babula*, 665 F.2d at 296 (*quoting United States v. Martinez-Fuerte*, 428 U.S. 543, 560-561, 96 S.Ct. 3074, 3084, 49 L.Ed.2d 1116 (1976)).

In addition, the Third Circuit noted that the INS questioned all of the workers at H & H, which the court apparently felt justified the questioning since the questioning of all workers does not involve the INS in the kind of discretionary law enforcement activity that was struck down in *Delaware v. Prouse*, *supra*.[21] It is therefore unclear what the Third Circuit would do were it presented with a case, such as the one presented to us here, where less than all workers were questioned.[22]

Finally, the *Babula* court attempted to harmonize its holdings with that of the Seventh Circuit in *Illinois Mi-*

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[21] "To insist neither upon an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion 'would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . . .' " *Delaware v. Prouse*, 440 U.S. at 661, 99 S.Ct. at 1400 (*quoting Terry v. Ohio*, 392 U.S. 1, 22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968)).

[22] As for theDavis surveys, the INS admits that it was impossible for them to question every worker out of the workforce of from 200-300 workers. Affidavit of Philip Smith, C.R. 14, at 3.

grant Council v. Pilliod, supra. The *Babula* court stated that the holding in *Babula* did not imply any disagreement with *Pilliod* because *Pilliod* involved late night, warrantless searches of living quarters. 665 F.2d at 297. This attempted harmonization is difficult to comprehend. First, the preliminary injunction in *Pilliod* was directed at factory area control operations, as well as searches of dwellings, dormitories and street encounters. *See Illinois Migrant Council v. Pilliod*, 398 F.Supp. 882, 886-891 (N.D.Ill.1975). Second, the factual discussion in *Babula* does not express the degree of detention, if any, that the workers at H & H suffered while being questioned during the area control operation there. All we know is that "three agents remained at the exits to the factory to prevent anyone from leaving the factory." 665 F.2d at 294. If *Babula* and *Pilliod* can be harmonized, it could only be from inferring that the *Babula* court felt that the degree of detention of the workers at H & H was of the non-detentive nature. This still does not entirely agree with the relief granted in *Pilliod*, for even if non-detentive questioning were involved at H & H, our reading of *Pilliod* would still require the INS agents to have a reasonable belief that the particular persons questioned without detention were aliens. On that note, the Third Circuit merely indicates that the agents "had observed nothing specifically about each person questioned, but rather based their suspicions on the milieu in which the workers were found." 665 F.2d at 296. This "milieu" standard is simply inconsistent with the standard adopted by the Seventh Circuit in *Pilliod*, and, in our minds, inconsistent with that required by the Fourth Amendment.

Thus, *Babula* provides this court with little assistance in deciding the issues before us. The *Babula* court relied heavily upon *Martinez-Fuerte*, a case we find inapplicable to the factory surveys that are the basis of the litigation presented in this case. Also, the *Babula*

court noted that the methodical questioning of all of the workers at the H & H facility minimized the random discretion criticized in *Delaware v. Prouse*, *supra*. The INS admits that each worker was not questioned at the Davis survey in this case; therefore, any justification, if such exists, from the fact that all workers were questioned in *Babula*, does not transfer to this case.

In sum, the intrusive nature of the factory surveys in the present case is comparable to that found in a roving patrol stop discussed in *Brignoni-Ponce*. *Martinez-Fuerte*, and *Babula*, therefore, cannot be accepted as models for an announcement that the factory surveys are not violative of the Fourth Amendment. The detention and questioning of the workers in the surveyed factories must be based upon a reasonable suspicion that each worker subjected to detentive questioning is an alien illegally in this country, and the Fourth Amendment rights of all workers depend upon a standard requiring the INS to articulate an individualized suspicion that a questioned person is in this country illegally.

3. The Record fails to Substantiate the INS Claim That the Fourth Amendment Standard Was Met During the Factory Surveys.

Finally, we must apply the constitutional standard to the facts of this case. The INS argues that there was a sufficient basis for the questioning that occurred at the two factories. Relying on *United States v. Cortez*, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981), where the Court defined reasonable suspicion to include an assessment of the totality of the circumstances surrounding a seizure in light of a law enforcement officer's experience, the INS points to a number of circumstances attending the factory surveys that justify the type of questioning that occurred. The INS directs our attention to the fact that the two factories surveyed were garment factories, an industry the INS alleges is

known to employ large numbers of illegal aliens; that prior to the Davis surveys, INS investigators had arrested several illegal alien employees outside the factory premises who stated that other illegal aliens were employed in the factory; that upon entry of the INS investigators into the plants, the employees shouted "La Migra" and a large number of employees began running around the factory or hiding; and that by the time of the second Davis survey, the INS investigators knew that they had previously apprehended 78 illegal aliens from the first survey. In addition, the INS once again asserts that it could justifiably question appellants Labonte and Miramontes, resident aliens, under 8 U.S.C. § 1357(a)(1).

None of the above factors alone, or in combination, can justify the detentive questioning in this case because we have held that the factory surveys conducted at the Davis and Mr. Pleat facilities involved a seizure or detention of the entire workforce by the nature in which the surveys were carried out.[23] Since the entire workforce is effectively detained in a manner implicating the Fourth Amendment standard discussed above, the circumstances the INS cites to justify the questioning simply do not aid our analysis of whether the INS had a reasonable, individualized suspicion of illegal alienage of each detained worker prior to the execution of the surveys. Moreover, we think the warrantless detention of the workforces in this case cannot possibly be justified under the standard we find applicable today.

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[23] Assuming a factory survey could be, or would be, performed in a non-detentive atmosphere, it is not appropriate in this case for us to provide the INS with a list of justifying factors for such a hypothetical survey. The constitutionality of questioning during such a non-detentive factory survey would be judged upon the specific facts giving rise to each instance of interrogation.

We feel the Fourth Amendment rights of workers would be impermissibly diminished were we to sanction the unconstrained use of warrantless, detentive questioning of the sort depicted by this record—questioning which is frightening to the workers, intrusive, and often "based on nothing more than inarticulate hunches." *Terry v. Ohio*, 392 U.S. at 22, 88 S.Ct. at 1880. The suggestions in the INS "M-69" handbook that a reasonable suspicion of illegal alienage may be based on an officer's knowledge of a high concentration of illegal aliens in the area surveyed, without more, is insufficient. *Heredia-Castillo, supra*. The apparent Hispanic ancestry of one sought for questioning, while possibly relevant, *see United States v. Brignoni-Ponce*, 422 U.S. at 886-87, 95 S.Ct. at 2582-83, is insufficient, even if noticed in conjunction with the knowledge of the presence of a person in an area known to contain a high concentration of illegal aliens. *Heredia-Castillo, supra*. That a factory happens to be a garment factory, without more, is insufficient grounds for the effective detention of the entire workforce in such a factory. Whether "excessive nervousness" or "studied nonchalance," of a suspected illegal alien observed prior to detentive questioning, would be sufficient to meet the standard announced in this opinion is basically a factual question to be resolved on a case-by-case basis. The INS makes no claim here that such observations were made of the entire workforces at the surveyed factories.

Certainly, *United States v. Cortez, supra*, instructs courts to grant some deference to the field officer's experience and his or her view of the totality of the circumstances attending any particular detention or apprehension. However, *Cortez* cannot be read to justify the detention of a workforce and questioning of workers on subjective or generalized suspicions that some unidentified workers in a factory may be found to be in

this country without proper documentation. The Court in *Cortez* held:

> "Based upon [the] whole picture, the detaining officers must have a *particularized and objective* basis for suspecting the particular person stopped of criminal activity."

449 U.S. at 417-18, 101 S.Ct. at 694-95 (emphasis added). The suspicious facts offered by the INS which provide a general focus upon the factories surveyed, while possibly true, do not provide sufficient justification for the execution of the surveys in a manner which effectively detains an entire workforce. The factors listed by the INS fail to provide a particularized and objective basis prior to the execution of the surveys for suspecting any of the questioned workers of being aliens illegally in this country.

We recognize that our decision today may hinder INS efforts to seek out illegal aliens in workplaces. Acknowledging that fact, we think it also appropriate to acknowledge that this case effectively illustrates the irony noted by Justice White when he commented some years ago on the INS' struggle to contain the heavy flow of illegal aliens into this country:

> "The entire system, however, has been notably unsuccessful in deterring or stemming this heavy flow; and its costs, including added burdens on the courts, have been substantial. *Perhaps the Judiciary should not strain to accommodate the requirements of the Fourth Amendment to the needs of a system which at best can demonstrate only minimal effectiveness as long as it is lawful for business firms and others to employ aliens who are illegally in the country.*"

Concurring opinion of Justice White, joined by Justice Blackmun in *United States v. Brignoni-Ponce*, *supra*, 422 U.S. at 914-15, 95 S.Ct. at 2597, and in *United States v. Ortiz*, 422 U.S. 891, 914-15, 95 S.Ct. 2585, 2597, 45 L.Ed.2d 623 (1975) (emphasis added). To find

the factory survey procedures evidenced by the record before us constitutional would be, as suggested by Justice White, straining the Fourth Amendment requirements in order to accommodate an intrusive and objectionable method of immigration law enforcement. The Constitution, as we interpret it, cannot be so accommodating. We therefore reverse the district court's summary judgment in favor of the INS on the issue of worker questioning.[24]

V. CONCLUSION

The summary judgment granted in favor of the INS on the issue of worker questioning is reversed. This case is remanded to the district court for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

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[24] The district court did not abuse its discretion in denying class certification. *See James v. Ball*, 613 F.2d 180, 186 (9th Cir. 1979), and cases cited therein.

Our holdings today also make it unnecessary to reach the issue of whether the district court correctly dismissed the ILGWU. The effects of our holdings will nevertheless inure to the benefit of the ILGWU.

APPENDIX B

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, ET AL., PLAINTIFFS-APPELLANTS,

v.

JOSEPH SURECK, ET AL., DEFENDANTS-APPELLEES.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, ET AL., PLAINTIFFS-APPELLANTS,

v.

JOSEPH SURECK, ET AL., DEFENDANTS-APPELLEES

Nos. 80-5054, 80-5153, 80-5035, 80-5152

Filed Sep 30, 1982

ORDER

Before: ANDERSON and NORRIS, Circuit Judges, and MUECKE,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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*The Honorable C.A. Muecke, Chief Judge, United States District Court, District of Arizona, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

I. L. G. W. U., ET AL., PLAINTIFFS,

v.

JOSEPH SURECK, ET AL., DEFENDANTS.

No. CV78-0740-LEW(Px),
No. CV78-3246-LEW(Px)

Filed Feb 20 1980

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendants' motion for summary judgment and plaintiffs' motion for summary judgment were heard on February 4, 1980, before the Honorable Laughlin E. Waters, United States District Judge. Plaintiffs appeared by and through their counsel, Henry R. Fenton. Defendants appeared by and through their counsel, Andrea Sheridan Ordin, United States Attorney, Frederick M. Brosio, Jr., Assistant United States Attorney, Chief, Civil Division, Molly Munger, Assistant United States Attorney, by Lawrence B. Gotlieb, Assistant United States Attorney. The Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

I

This is a consolidated action. The pleadings of both actions make virtually identical claims. The most recent complaints on file in this action are the first amended complaint in No. CV78-0740-LEW (Px) (hereinafter "FAC") and the complaint in No. CV78-3246-LEW(Px) (hereinafter "COMPLAINT").

II

The Court granted defendants' motion for partial summary judgment on December 3, 1979, and denied plaintiffs' cross-motion for partial summary judgment, finding that plaintiffs' prayers for an injunction against the use of search warrants or owner consent to obtain entry by investigators of the Immigration and Naturalization Service in the Central District of California (hereinafter "INS") in conducting surveys in work places were without merit and plaintiffs lacked standing.

III

Plaintiffs' remaining prayer is "for an order enjoining the defendants from arresting, detaining, stopping and interrogating or otherwise interferring [sic] with the rights of the plaintiffs ostensibly because of their Latin appearance, unless the defendants possess a valid warrant to search for [sic] arrest with regard to the individual plaintiffs, have probable cause to search or arrest individual plaintiffs without a warrant, or have reasonable suspicion based on specific irrefutable facts that the plaintiffs are aliens unlawfully in the United States." (First Amended Complaint, prayer No. 2).

IV

No material facts are in dispute. Each of the four plaintiffs was asked a question or questions by an INS investigator on one occasion during the surveys conducted by INS at Southern California Davis Pleating Company on January 4, 1977 and September 26, 1977, or at Mr. Pleat on October 7, 1977. On these dates some INS investigators were inside the factories and some were at the exits. At the surveys, 78 illegal aliens were arrested on January 4, 1977, 39 illegal aliens were arrested on September 26, 1977, and 45 illegal aliens were

arrested on October 7, 1977. None of the four plaintiffs was arrested or taken into custody.

V

Any finding of fact which also contains a conclusion of law shall be deemed incorporated within the conclusions of law.

CONCLUSIONS OF LAW

I

Plaintiffs request for the proposed injunction is without merit as a matter of law. The conduct of INS investigators which plaintiffs claim took place is lawful.

II

Law enforcement officials may ask questions of anyone so long as the person is not restrained or physically detained. *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Cuevas-Ortega* v. *Immigration and Naturalization Service*, 558 F.2d 1274 (9th Cir. 1979); *Cordon de Ruano* v. *Immigration and Naturalization Service*, 554 F.2d 944 (9th Cir. 1977).

III

An alien or person believed to be an alien may be questioned concerning his right to be in the United States. 8 U.S.C. § 1357(a) (1).

IV

There was no arrest or detention of any of the plaintiffs. There was no other seizure of the plaintiffs under the Fourth Amendment. *Terry* v. *Ohio*, 392 U.S. 1 (1968). Even if plaintiffs had experienced some form of seizure by the placement of INS investigators at the factory exits, the degree of intrusion on plaintiffs was so limited that there was no violation of the Fourth Amendment. *Terry* v. *Ohio*, *supra*, at 20; *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 557-558 (1976).

V

Accordingly, defendants' motion for summary judgment should be granted and plaintiffs' motion for summary judgment should be denied, and judgment should be entered in favor of defendants and against plaintiffs.

VI

Any conclusion of law which also contains a finding of fact shall be deemed incorporated within the findings of fact.

DATED: This 15 day of Feb., 1980.

/s/ _____
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

I. L. G. W. U., ETC., ET AL., PLAINTIFFS,

v.

JOSEPH SURECK, ET AL., DEFENDANTS.

No. CV78-0740-LEW(Px)
No. CV78-3246-LEW(Px)

Filed Feb 15 1980

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendants' motion for partial summary judgment and plaintiffs' motion for partial summary judgment were heard before the Honorable Laughlin E. Waters, United States District Judge, on December 3, 1979. Plaintiffs appeared by and through their counsel, Henry R. Fenton. Defendants appeared by and through their counsel, Andrea Sheridan Ordin, United States Attorney, Frederick M. Brosio, Jr., Chief, Civil Division, by Molly Munger, Assistant United States Attorney, and Lawrence B. Gotlieb, Assistant United States Attorney. On January 4, 1980, defendants moved to supplement the Findings of Fact and Conclusions of Law, which motion was not opposed by plaintiffs. The Court, having duly considered all the arguments by the parties, makes the following Findings of Fact and Conclusions of Law as to the parties' respective motion for summary judgment:

FINDINGS OF FACT

1. This is a consolidated action. The pleadings in both actions make virtually identical claims. The most recent complaints on file in the actions are the First Amended Complaint in Civ. No. 78-0740-LEW(Px) (hereafter

"FAC") and the Complaint in Civ. No. 78-3246-LEW(Px) (hereafter "Complaint").

2. Plaintiff I.L.G.W.U., a labor union, was dismissed from this action for lack of standing by order entered November 20, 1979. Hereinafter "Plaintiffs" refers to the remaining plaintiffs in this action.

3. Plaintiffs seek a declaratory judgment in the following form:

> "[T]hat surveys of the Immigration status of the employees of a business establishment are unlawful unless conducted pursuant to a valid search warrant or the consent of the persons to be searched" (Complaint, prayer at ¶ 1);
>
> "That an employer may not lawfully consent to a search of his employees" (Complaint, prayer at ¶ 1); and
>
> "That defendants may not engage in the pattern of stopping or questioning the work force in a plant where the warrant does not specifically describe the individuals to be stopped or questioned" (Complaint, prayer at ¶ 1).

Plaintiffs have also demanded an injunction against:

> "[T]he use of search warrants which are not particularized with respect to the individuals described." (Complaint, prayer at ¶ 2).

4. These provisions constitute a request that the Court order as follows:

(A) That the Immigration and Naturalization Service in the Central District of California ("INS") may not enter a workplace to conduct a survey without a warrant unless all of the employees at the workplace first consent to the entry; and

(B) That the INS may not use a search warrant to enter a workplace to conduct a survey unless the search warrant identifies each person with whom INS will have contact while inside the workplace.

5. No material facts necessary to support these claims are in dispute. Specifically:

(A) The INS has not in the past followed the practice of obtaining the consent of all the employees at a workplace to conduct a workplace survey. Where a warrant has not been obtained before entering, the INS has instead relied on the consent of the owner or manager of the workplace.

(B) In obtaining a warrant to conduct workplace surveys, the INS has not in the past identified in the warrants every employee to be contacted.

(C) Plaintiffs do not control, either solely or jointly, access of other persons to the premises in which they are employed.

6. Any finding of fact which also contains a conclusion of law shall be deemed incorporated within the conclusions of law.

CONCLUSIONS OF LAW

1. Plaintiffs do not have a reasonable expectation of privacy in the factory premises in which they are employed.

2. Plaintiffs have no standing to challenge the entry of Immigration and Naturalization Service officers into the factory premises in which they are employed.

3. Plaintiffs have no standing to challenge either the warrant or the consent procedures by which Immigration and Naturalization officers gain access to the premises in which they are employed.

4. Plaintiffs' request for the proposed declaration and injunction is without merit as a matter of law. Specifically:

(A) The owner or manager of a workplace may give a valid consent to an entry by the INS into his premises. *United States* v. *Matlock*, 415 U.S. 164 (1974); *United States* v. *Gargiso*, 456 F.2d 584, 587 (2nd Cir. 1972); *United States* v. *Friedman*, 381 F.2d 155 (8th Cir. 1967).

(B) A search warrant used by the INS to obtain access to a workplace for the purpose of INS law enforcement need not identify each and every person to be contacted by the INS while inside the workplace. In no case has this been required. See *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973) (concurring opinion by Justice Powell); *United States* v. *Cantu*, 557 F.2d 1173 (5th Cir. 1977); *United States* v. *Pacheco-Ruiz*, 549 F.2d 1204, 1207 (9th Cir. 1976); *United States* v. *Rodriquez*, 532 F.2d 834 (2d Cir. 1976); *United States* v. *Karathanos*, 531 F.2d 26 (2d Cir. 1976), *cert. denied* 428 U.S. 910 (1976).

(C) Federal Rules of Criminal Procedure, Rule 41, as amended, authorizes the issuance of search warrants to gain access to illegal aliens who are present in places of employment, F.R.CR.P., 41(b)(4).

(D) The search warrants which are the subject of plaintiffs' motion describe the objects of the proposed searches with sufficient particularity to meet the requirements of F.R.CR.P. 41 and the Fourth Amendment.

(E) The affidavits supporting the search warrants which are challenged by plaintiffs do set forth sufficient probable cause.

5. Accordingly, partial summary judgment was entered for defendants on December 10, 1979, and the order denying plaintiffs' motion for partial summary judgment was entered on January 28, 1980.

6. Any conclusion of law which also contains a finding of fact shall be deemed incorporated within the findings of fact.

DATED: This 14 day of Feb., 1980.

/s/ _____

UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

I.L.G.W.U., ETC., ET AL., PLAINTIFFS,

v.

JOSEPH SURECK, ET AL., DEFENDANTS.

No. CV 78-0740-LEW(PX)
No. CV 78-3246-LEW(PX)

Filed Dec 4 1979

Hearing Date: December 3, 1979
Time: 9:00 a.m.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendants having moved on December 3, 1979 for an order granting partial summary judgment in the above matter, the matter having been briefed and argued, and the Court having duly considered the arguments by all parties; the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This is a consolidated action. The pleadings in both actions make virtually identical claims. The most recent complaints on file in the actions are the First Amended Complaint in Civ. No. 78-0740-LEW (PX) (hereafter "FAC") and the Complaint in Civ. No. 78-3246-LEW (PX) (hereafter "Complaint").

2. Plaintiffs seek a declaratory judgment in the following form:

> "[T]hat surveys of the Immigration status of the employees of a business establishment are unlawful unless conducted pursuant to a valid search war-

rant or the consent of the persons to be searched" (Complaint, prayer at ¶ 1);

"That an employer may not lawfully consent to a search of his employees" (Complaint, prayer at ¶ 1); and

"That defendants may not engage in the pattern of stopping or questioning the work force in a plant where the warrant does not specifically describe the individuals to be stopped or questioned" (Complaint, prayer at ¶ 1).

Plaintiffs have also demanded an injunction against:

"[T]he use of search warrants which are not particularized with respect to the individuals described." (Complaint, prayer at ¶ 2).

3. These provisions constitute a request that the Court order as follows:

(A) That the Immigration and Naturalization Service in the Central District of California ("INS") may not enter a workplace to conduct a survey without a warrant unless all of the employees at the workplace first consent to the entry; and

(B) That the INS may not use a search warrant to enter a workplace to conduct a survey unless the search warrant identifies each person with whom INS will have contact while inside the workplace.

4. No material facts necessary to support these claims are in dispute. Specifically:

(A) The INS has not in the past followed the practice of obtaining the consent of all the employees at a workplace to conduct a workplace survey. Where a warrant has not been obtained before entering, the INS has instead relied on the consent of the owner or manager of the workplace.

(B) In obtaining a warrant to conduct workplace surveys, the INS has not in the past identified in the warrants every employee to be contacted.

CONCLUSIONS OF LAW

1. Plaintiffs' request for the proposed declaration and injunction is without merit as a matter of law. Specifically:

(A) The owner or manager of a workplace may give a valid consent to an entry by the INS into his premises. *United States* v. *Matlock*, 415 U.S. 164 (1974); *United States* v. *Gargiso*, 456 F.2d 584, 587 (2nd Cir. 1972); *United States v. Friedman*, 381 F.2d 155 (8th Cir. 1967).

(B) A search warrant used by the INS to obtain access to a workplace for the purpose of INS law enforcement need not identify each and every person to be contacted by the INS while inside the workplace. In no case has this been required. See *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (concurring opinion by Justice Powell); *United States v. Cantu*, 557 F.2d 1173 (5th Cir. 1977); *United States v. Pacheco-Ruiz*, 549 F.2d 1204, 1207 (9th Cir. 1976); *United States v. Rodriquez*, 532 F.2d 834 (2d Cir. 1976); *United States v. Karathanos*, 531 F.2d 26 (2d Cir. 1976), *cert. denied* 428 U.S. 910 (1976).

DATED: This 3 day of Dec, 1979.

/s/ _____
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

I.L.G.W.U., ETC., ET AL., PLAINTIFFS,

v.

JOSEPH SURECK, ET AL., DEFENDANTS.

No. CV 78-0740-LEW (PX)
No. CV 78-3246-LEW (PX)

Filed Dec 4 1979

Hearing Date: December 3, 1979
Time: 9:00 a.m.

PARTIAL SUMMARY JUDGMENT

Defendants having moved on December 3, 1979 for an order granting partial summary judgment in the above matter, the matter having been briefed and argued, and the Court having duly considered the arguments by all parties,

IT IS HEREBY ORDERED as follows:

1. The motion for partial summary judgment is granted.

2. The following portions of the prayers set forth in plaintiffs' pleadings are denied:

A. The requests for declaratory relief as follows:

"[T]hat surveys of the Immigration status of the employees of a business establishment are unlawful unless conducted pursuant to a valid search warrant or the consent of the persons to be searched" (Complaint in Civ. No. 78-3246-LEW(PX) ("Complaint"), prayer at ¶ 1);

"That an employer may not lawfully consent to a search of his employees" (Complaint, prayer at ¶ 1; and

"That defendants may not engage in the pattern of stopping or questioning the work force in a

plant where the warrant does not specifically describe the individuals to be stopped or questioned" (Complaint, prayer at ¶ 1).

B. The request for an injunction against:

"[T]he use of search warrants which are not particularized with respect to the individuals described." (Complaint, prayer at ¶ 2.)

3. The following paragraphs from plaintiffs' pleadings are ordered stricken as surplusage:

First Amended Complaint in Civ. No. 78-0740-LEW(PX): Paragraphs 22, 23, 24, 26, 27, 35, 44, 45, 46. Complaint: Paragraphs 20, 21, 22, 24, 25, 34, 38, 39, 40, 41, 42, 43.

These paragraphs serve no purpose except to support the portions of the prayers which have now been denied.

DATED: This 4 day of Dec, 1979.

/s/ _____

UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

I.L.G.W.U., ET AL., PLAINTIFFS,

v.

JOSEPH SURECK, ET AL., DEFENDANTS.

No. CV 78-0740-LEW(Px)
No. CV 78-3246-LEW(Px)

Filed Nov 16, 1979

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFF INTERNATIONAL LADIES' GARMENT WORKERS' UNION

Defendants' Motion to Dismiss Plaintiff International Ladies' Garment Workers' Union ("ILGWU" or the "union") having come on for hearing before this Honorable Court on August 20, 1979, the parties having submitted their papers for decision, and the Court, having read and considered the papers filed in connection with this Motion, as well as the other papers and pleadings on file in this action, finds as follows:

1. This is an action for declaratory and injunctive relief brought by the ILGWU and four individuals who are employed in garment factories and are members of the union.

2. The plaintiffs seek to challenge on constitutional grounds certain alleged practices of the United States Immigration and Naturalization Service ("INS") followed by INS in conducting surveys in factories.

3. The ILGWU alleged in the First Amended Complaint that it was suing in its representational capacity and pursuant to Section 9(a) of the National Labor Relations Act (29 U.S.C. § 159(a)). In its Opposition to

Defendants' Motion, the ILGWU also alleged that it was suing on its behalf.

4. The ILGWU is an international labor organization. It functions as exclusive collective bargaining representative for employees at Southern California Davis Pleating Company and Mr. Pleat, the two garment factories which employ the four individual plaintiffs.

5. In order for an association such as ILGWU to maintain the instant action, it must satisfy the Article III constitutional requirement of having standing to sue, which may be done in one of two ways. First, the union may sue if it has specific, concrete injury to itself. *Simon* v. *Eastern Kentucky Welfare Rights* Organization, 426 U.S. 26, 40 (1976). *Warth* v. *Seldin*, 422 U.S. 490, 508 (1975). Second, if it has no injury to itself, the association may sue as a representative of its members, but only if, *inter alia*, the interests it seeks to protect are germane to the association's purpose. *Hunt* v. *Washington Apple Advertising Commission*, 432 U.S. 333, 343 (1977).

6. The union has made no showing of any specific, concrete injury to itself which would satisfy the constitutional requirement of standing to maintain this action on its own behalf.

7. The union has shown no cognizable right of its own which has been violated. Furthermore, Section 9(a) of the National Labor Relations Act (29 U.S.C. § 159(a)) does not confer any express right of action on the union in this action. Thus, even if the union had been able to satisfy the constitutional limitation of specific, concrete injury to itself, conferring standing, it fails to satisfy the prudential limitations to standing. *Warth* v. *Seldin*, *supra*, at 499-501.

8. There being no nexus between the purpose of the union and the relief sought in the instant action, i.e., an injunction against certain enforcement actions by the INS allegedly affecting persons of Latin ancestry, the

union lacks standing to maintain this action in any associational capacity.

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss Plaintiff ILGWU is granted, and the action is dismissed as to plaintiff ILGWU.

Costs are taxed against ILGWU in the amount of $ ____ .

DATED: This 16 day of Nov, 1979.

/s/ LAUGHLIN E. WATERS
UNITED STATES DISTRICT JUDGE

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 80-5054, 80-5153, 80-5034, 80-5152

DC CV 78-3246, 78-0740

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, ET AL., PLAINTIFFS-APPELLANTS

v.

JOSEPH SURECK, ET AL., DEFENDANTS/APPELLEES

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, ET AL., PLAINTIFFS-APPELLANTS

v.

JOSEPH SURECK, ET AL., DEFENDANTS/APPELLEES

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

Filed and entered July 15, 1982